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Vol. III

TRANSCRIPT OF RECORD

(Pages 1051 to 1595)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

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THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U FILM EXCHANGE, INC., APPELLANTS,

vs.

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AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

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tion thereof is divided between two or more exhibitor defendants for the purpose of restraining competition unreasonably or monopolizing exhibition or distribution with respect to such theatre? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to refrain from building, buying or offering to lease (1458a)

theatres in areas where they might compete with existing affiliated theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or any city or town thereof? A. No."

(1459)

WILLIAM J. KUPPER, called as a witness on behalf of defendant Twentieth Century-Fox, being first duly sworn, testified as follows:

Direct Examination by Mr. Caskey:

Q. Where do you reside, Mr. Kupper? A. 36 Sutton Place, Lawrence, Long Island.

Q. What is your occupation? A. I am employed by Twentieth Century-Fox Film Corporation as their general sales manager.

Q. What are your duties as such? A. I am in charge of and responsible for the sales of our merchandise in the United States and Canada to the theatres, and the operation of our distribution organization of 31 branch offices in the United States.

Q. Who are your superior officers, if any? A. Mr. Thomas J. Connors, who is vice-president of the company in charge

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of distribution, world-wide distribution, Mr. Spyros Skonras, who is president, and also an executive vice-president, Mr. Michel.

Q. And another officer of the company has the supervision of distribution outside of the United States and Canada?
A. That is correct.

Q. How long have you been engaged in the motion picture business? A. I was employed by Fox Film Corporation—if I may look back—on October 7, 1919, and I have been with (1460)

that corporation ever since through various positions.

Q. And you have not been employed by any other company in the motion picture business? A. No, this has been continuous service.

Q. Briefly, will you state the nature of that service? A. When I was employed on October 7, 1919, I was employed as a clerk in their contract department; and on June 12, 1920, I went to Dallas, Texas, as their assistant branch manager; on October 8, 1921, I became branch manager of our Washington, D. C., office; on January 14, 1922, I became manager at the Albany, New York, office at our branch office there; on June 10, 1922, I went to Charlotte, as branch manager there; on January 27, 1923, I became the branch manager at the Fox office in Pittsburgh, Pennsylvania; on January 19, 1924, I was transferred to the home office as assistant to the general sales manager at that time, who was R. A. White; on May 31, 1924, I went to Chicago and became the branch manager there; November 29, 1924, I went back to Pittsburgh as branch manager; on December 29, 1928, I was transferred to the home office again here in New York as special field representative, assisting the then sales manager, Mr. James R. Grainger; on January 26, 1929, I became assistant general sales manager; and on November 7, 1931, I became Western Division manager under Mr. John D. Clark, who was then the sales manager; on May 28, 1942,

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I was made assistant to Mr. Connors, who is the vice-president of Twentieth Century-Fox Film Corporation; and on August 2, 1943, I was made general sales manager for this company, which position I occupy today.

Q. What does Twentieth Century-Fox Film Corporation distribute? A. It distributes feature motion pictures; it distributes newsreels; it distributes short subjects; and it distributes the March of Time, which is a two-reel subject. It is all photographic film.

Q. Is the latter produced by it? A. No, it is not. Some of our short subjects are not produced by us either. They are produced by independent producers.

Q. Now, how many exchanges does Twentieth Century-Fox have in the United States? A. 31.

Q. In what cities are they located? A. Do you want the list of them?

Q. No; I don't mean by name, but what type of city? A. Well, New York City—well, the type of city is generally the most important distribution center in that State or area.

Q. And how was the number of exchanges fixed or determined? A. Well, they gradually grew; I mean they increased; a few of them were put on because the territory expanded and developed, and we thought it was important and

(1462)
necessary when we had more theatres come into an area, so we could properly service these accounts.

Q. Have the cities in which Twentieth Century-Fox's exchanges are now located been determined by any agreement with any other distributors? A. I don't know of any such agreement.

Q. And these cities in which you now have exchanges are the same ones that there were exchanges in when you came with the company? A. Not when I came. There are some additional ones than when I came with the company.

William J. Kupper—By Defendant—Direct

Q. Such as Oklahoma City? A. Oklahoma City, Charlotte, Memphis, Portland.

Q. Now, describe very briefly but clearly to the Court what an exchange is? A. Well, an exchange is our branch office from which we distribute our motion pictures for a given area or set-up area, and it handles all the physical work, the inspection, the shipping, and the selling for the area in which it operates.

Q. Who has the supervision of the exchange? A. Well, there is a branch manager who is directly responsible for the local operation.

Q. Now under him is a sales organization? A. Yes; and they vary in the size of the office from two men up to five, six or eight men.

Q. And then there are bookers? A. And there are bookers. (1463)

Q. And what does a booker do? A. Well, a booker is the man responsible for the work of definitely setting up the playing time that is agreed to between the exhibitor and the book. He is responsible to see that the pictures are booked and supplied to the account that licenses the film.

Q. Why do you use that word "book"? A. Well, he works from a big book, and I suppose it was just through custom that the name has developed; he has a master book that shows every day in the week, and the days of the month, and it goes on, and he works down from the number of prints he has, and it all runs in an order as the time is filled or it is booked up; and that is why they call it booked; that time is booked. And there is the time for shipping or reshipping of the film, and it all goes in there.

Q. That is, taking a specific picture like Nob Hill in an exchange like New Haven, there is a line for each print that the New Haven exchange has? A. That is correct.

Q. And across the page is a space for every day? A. Every day.

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Q. And when the booker for the Bijou Theatre, the exhibitor, comes in, he agrees with the date on your book, is that right? A. That is right, and that is inserted in the book from thereon, and the billing and the shipping is made. (1464)

Q. Now, do you have a cashier department? A. Yes, sir.

Q. And do you have a shipping department? A. Shipping department.

Q. And an inspection department? A. And an inspection department.

Q. What authority in the licensing of motion pictures does a salesman have? A. Well, he has no authority to license them. He has the authority to go out and he does go out and solicits the license.

Q. Does each salesman in the Twentieth Century-Fox organization have a definite territory? A. Yes, pretty definite.

Q. And he calls upon the exhibitors in that territory? A. He does.

Q. He has the duty to negotiate for applications for license? A. That is correct.

Q. And when he has arrived at an agreement with an exhibitor, what does he do? A. He submits it to his branch manager for his approval or recommendation and whether or not he is satisfied with the negotiation.

Q. Now, assuming that the branch manager is not satisfied, what happens? A. Well, he is liable to reject the application and we never see it.

Q. Then what happens? A. Then the exhibitor would be resolicited again by the salesman or possibly by the branch (1465)

manager to get the terms that they want.

Q. They both get in a car and drive over to see him? A. They go by car or they could go by train, too, I suppose.

Q. But they do; I mean they renegotiate? A. Yes, they renegotiate.

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Q. And then when there comes an arrangement that is satisfactory to the salesman and to the branch manager, what is done? A. He in turn submits it to his district manager, who will look the contract over and weigh it according to how he sees it. If he is satisfied with it, he will send it out to his sales manager. If he is not, he will reject it again.

Q. And assuming that he is satisfied and sends it to his sales manager, what is the procedure then? A. Then the sales manager will analyze it and study it and decide whether or not it is the right kind of a contract that we should accept in that situation.

Q. And if he is satisfied, what is done? A. He automatically accepts it and it is approved to the exchange or to the district office. It goes back through that route that I brought you up through.

Q. And in due course a signed copy is sent to the exhibitor? A. To the exhibitor. An executed copy is signed by an official of the company, or an officer of the company, I should say.

(1466)

Q. Now, has that general practice of negotiation and examination, renegotiation, submission, been carried on since you have been in the motion picture business? A. Generally; but when I started with Fox we did not have such a great organization. We did not have a lot of district managers or sales managers. It was done direct by the branch manager through the general sales manager.

Q. You say you have 31 exchanges. How many districts are there? A. I believe I have eleven.

Q. And have you some memorandum of it? A. Yes, I have a record of it here. Yes, I think it is eleven (consulting paper). Eleven.

Q. And how many division sales managers are there? A. I have four.

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Q. Who are they? A. Well, in the East we have Mr. A. W. Smith; in the South we have Mr.—oh, Mr. Smith, incidentally, operates out of New York—we have Mr. Harry Ballance, who covers the six Southern offices and operates out of Atlanta; Mr. W. C. Gehring, who has the Central offices; he also operates out of New York. Mr. Herman Wobber, who has the six Coast offices, and he operates out of San Francisco.

Q. Mr. Gehring has been with the company how long?

A. Well, I think Mr. Gehring was with the company when I came with the company, and worked in the Buffalo exchange. (1467)

Q. He was discharged earlier than you from the Army?

A. I guess a few days, or a month maybe.

Q. And how long has Mr. Wobber been with the company? A. I think Mr. Wobber came with the company in 1932, about the time Mr. Kent came with the company.

Q. And for a period of ten years he was general sales manager? A. Yes.

Q. And Mr. Ballance has been with the company how long? A. Since about 1932 or 1933; I am not sure whether it is late 1932 or early 1933.

Q. And how long has Mr. Smith been with the company?

A. Mr. Smith has not been there so long. I think it is going on four years.

Q. Now, do you and Mr. Connors and these four sales managers know personally a great many of the exhibitors of the country? A. Well, we know a lot of them. Whether you would call them a great many—we have met a lot of them.

Q. Sold a lot of them? A. Sold a lot of them.

Q. Been in their theatres? A. Been in a lot of theatres.

Q. What kind of a building is an exchange in? A. It is supposed to be a fireproof building, and they try to get a fireproof building. Generally it is an independent building. I know that our exchanges, buildings that we built or had

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built, had specially designed features that would protect our merchandise, good places to operate and work from.

Mr. Caskey: Would you mark this please for identification?

(Marked Defendant Twentieth Century-Fox Exhibit F-5 for identification.)

Q. Mr. Kupper, I show you a document marked F-5 for identification, and ask you if that contains a number of features which the company has released since 1929? A. I believe it is exactly the number; I have not checked it. It looks like it to me, like they are the exact numbers in each season.

Q. Now I notice that during the 1944-1945 season the number of releases was but 25, whereas in 1941-1942 it was 54. What is the reason for that decline in the number of pictures released? A. There are a lot of reasons; several of them anyway.

Q. Will you give them? A. In my opinion one was the fact that we had a war and we lost a lot of our talent, lost a lot of our technicians, plus the fact that there was a reduction in available negative that you could use to make positive prints of. Those are some of the reasons for it.

Q. Did the War Production Board impose restrictions on the amount of raw stock that could be used? A. Yes, sir. (1469)

Q. And that directly affected the number of pictures which could be produced? A. I would say it did to some extent.

Q. Was there any agreement by you or by any officer of the company to your knowledge in fixing the number of pictures which would be released during any of these seasons with any other distributor? A. Not to my knowledge.

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Q. You did not make any such agreements? A. I never did, no, sir.

Q. Now, in addition to the exchanges and the function of its representatives that you told us about, you have an advertising department, do you not? A. Advertising and exploitation department, yes, sir.

Q. What is their function? A. Their function is to build up the material, the advertising material; also work out these press books, and work out the advertising campaigns so the exhibitor can exploit and sell the pictures to the public.

Q. Now you have a certain amount of advertising to the exhibitors? A. Do we have a certain amount to the exhibitors?

Q. That is directed to the exhibitors primarily? A. Yes, directed to all the exhibitors.

Q. Where does that advertising appear? A. Well, it is made or at least worked out or through our exploitation (1470)

department and sent to our exchanges, and they in turn send it to all exhibitors who license our merchandise. It is done to help them sell the merchandise to the public.

Q. And when you release a picture like Nob Hill, you prepare a press book containing various appropriate advertisement to be inserted in the newspapers? A. They are all prepared in advance of our release, the sale and the licensing of the picture.

Q. Those press books are sent to the exhibitors? A. Sent to our exchange and given to the exhibitors.

Q. Do you also prepare sheets to be used in the lobbies? A. You mean lithographs?

Q. Yes. A. Yes, we do, and photographs as well.

Q. So-called stills? A. Stills.

Q. And those are sold to the various exhibitors? A. Sold at a very nominal price so they can sell and exploit the picture.

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Q. And you also advertise in the trade papers? A. Yes, extensive.

Q. And do you advertise also directly to the theatre-going public? A. Either advertise or exploit, or at least we get it in various magazines so that it gets to the public in some way. We want the public to know we have got that picture.
(1470-A)

Q. There are a number of so-called fan-magazines in the country? A. Yes, quite a few.

Q. Are these some of those (indicating)? A. Yes, sir, I recognize all of them as such.
(1471)

Q. And do they have an extensive circulation? A. Great circulation. I am told that, at least, by our publicity department that they have a wide circulation.

Q. And you advertise in those magazines? A. We do.

Q. And you also attempt to have synopses of the forthcoming motion pictures printed in those magazines? A. Yes, sir, we like to have a very good story with pictures and everything else so they know what kind of a picture we have got. I mean the public.

Q. Now, do you also advertise in weekly magazines like Time or Life or Saturday Evening Post or Collier's? A. Yes, sir.

Q. Do you advertise on the radio? A. Yes, sir.

Mr. Wright: If the Court please, the purpose of this is not apparent to me. It seems to me it is completely irrelevant to any issue that is being tried.

Judge Hand: What is the purpose?

Mr. Caskey: The purpose of it is to show competition in the distribution of motion pictures to induce people to come to see our pictures in preference to somebody else's, which I suppose is competition.

Judge Hand: All right.

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Q. Now, in addition to this type of advertising, do you have exploitation representatives in the field? A. Yes, we do. (1472)

Q. Tell the Court about that. A. Well, in each district we try to maintain one or sometimes two or more men that would circulate around. I mean, after we have licensed a picture for exhibition and the picture was dated and set in the theatre, our men went out and helped and try to exploit that piece of merchandise of ours and see that it was given all the exploitation possible so they could return the greatest gross in that theatre; and we thereby get a good and substantial film rental.

Q. Does the company participate in the advertising expense of the theatres? A. In some of them it does.

Q. How is that done? A. Well, generally through our exploitation, we have what we call a cooperative advertising campaign in which they were worked out—let us say a theatre has a budget of \$500 to spend on a picture, and we think they ought to spend more. Well, they work it out and try to show him and convince him that he ought to spend \$200 or \$300 more, half of which we probably will participate in, or a third, and so on; and he will work out that additional campaign over and above what the theatre budget will allow or require.

Q. I now turn to the method of sales prior to the consent decree: Previous witnesses have testified to the practice in their companies of holding conventions. Did Twentieth Century-Fox hold conventions? A. As far back as I can recall they had a convention every year; sometimes two, but generally one. (1473)

Q. Aside from what Mr. Seymour referred to as the social activities, what occurs at those conventions? A. Well, there was a lot more than social activities with Fox. You would go there and you would listen to Mr. Fox or Sheehan or

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whoever was in charge of production at the time tell you what we were going to make; and you sat there for days and argued about whether it was going to be good or bad, and what prices you thought you could get for it. And if they had something finished they would show it to you at the conventions.

Q. Now, at the time of these conventions did the publicity department have illustrated booklets referring to the coming year's product? A. Yes, sir. They generally had for each year, each season, a big book. Some were pretty expensive too, and some were very elaborate; and they were made, and that is when they were first put out; at least, they were put out simultaneous with our convention.

Q. I show you this book and ask you if that is the book that was used at the 1932 convention? A. Yes, sir.

Judge Hand: I fail to see what this is all about. I do not understand that Mr. Wright disputes that there was competition about those things you are talking about.

(1474)

Mr. Wright: There is not any question about that. In so far as pictures themselves are concerned, I suppose every picture that plays, whether it plays in theatres owned by the same exhibitor or in others, it is in competition for public patronage with every other picture, and that each distributor wants to get the most that he possibly can out of every picture that is exhibited, wherever it is exhibited. I do not think there can be any question about that.

Mr. Caskey: Well, is it also conceded that we are in competition with each other for the exhibitor's playing time?

Mr. Wright: No. When it comes to playing time, within very definite limits. There is no question, of

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course, but what each distributor of these defendants would again like to have as much playing time in every theatre in the country as he can get; but when it comes to determine how that playing time is going to be allotted in the theatres in which they are interested, we say that that is a matter in which there are artificial restraints imposed.

Mr. Caskey: It is very difficult to get any concession except the most general one, and whenever we get to a specific problem we are met with this type of
(1475) reply.

Mr. Wright: Well, why don't you take him into the playing time situation and develop what you want to develop?

Mr. Caskey: I am going to.

Then I will finish this with one or two questions:

Q. After the convention were these booklets sent to the exhibitors of the country? A. Yes, sir.

Q. And carried by the salesmen as they called upon the exhibitors? A. Until they wore them out, I guess.

Mr. Caskey: Now, will you mark this, please, for identification.

(Marked Defendant Twentieth Century-Fox's Exhibits F-6, F-7 and F-8 for identification.)

Q. I show you Defendants' Exhibits F-6, F-7 and F-8 for identification and ask you what they are. A. That is the form of contract which we used in our licensing of pictures, or the application of it, and later became the contract, for each of those seasons.

Q. What were those seasons? A. Well, one was the season
1929-30—

William J. Kupper—By Defendant—Direct

Mr. Wright: Could we have it hooked up with the number so we will know what he is talking about?

A. (Continuing) —F-6 this is, That is the 1929-30 contract (1476) form; F-7 is the 1930-31 season, a copy of it at least; F-8 is the 1931-32 season.

Q. Now, were these all forms which were generally used in licensing motion pictures in those years? A. By our company, yes.

Mr. Caskey: I offer them.

Mr. Wright: We have no objection.

(Defendant Twentieth Century-Fox's Exhibits F-6, F-7 and F-8 for identification received in evidence.)

Q. Now, during those years, Mr. Kupper, the names of the pictures which you were licensing were specified on the contract, were they not? A. Yes, sir.

Q. With some slight description of either the star or the source of the projected motion picture? A. Yes, sir.

Q. And a definite program of pictures was licensed to the exhibitor? A. Yes, sir.

Q. At the time of the solicitation of the exhibitor, had those pictures been produced? A. All of them?

Q. Yes, sir. A. Very few in the early license agreements. They might have all been made by the time the license was made for the later ones. For some of the smallest license agreements they might have been made, because you run your pictures at least two years—at least that long—and you certainly license them by that time, and they would have been finished; but for the first early months there would be very few made.

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(1477)

Q. And those contracts which were negotiated, say, in the summer preceding the beginning of the season, only a few pictures had been manufactured? A. That is correct.

Q. And did you find it possible to deliver the specific pictures which were enumerated in the contract? A. Well, I doubt whether you could tell yourself whether it was the same thing there or not.

Q. Now, when did Mr. Kent, come with the company?
A. I believe it was in 1932.

Q. And what year's production did he first have responsibility for? A. Well, I am not sure. I think it was 1933.

Q. 1933-34 season? A. Yes.

Q. That is the so-called K-1 season? A. We designated that to officially stamp the first year he had something to do with the setting up of the production and the production budget.

Mr. Caskey: Now will you mark this for identification.

(Marked Defendant Twentieth Century-Fox's Exhibit F-9 for identification.)

Q. Is this contract F-9 for identification the form which was used in the 1933-34 season? A. It is a photostat of that contract, yes.

Q. And under that form there is no specification of the pictures to be released? A. That is correct.

(1478)

Mr. Caskey: I offer it.

Mr. Wright: No objection.

(Defendant Twentieth Century-Fox's Exhibit F-9 for identification received in evidence.)

William J. Kupper—By Defendant—Direct

Q. Now, Mr. Kupper, in the 1941 season you began to sell under the consent decree? A. Yes, sir.

Q. And a new form of contract was prepared in that year? A. Yes.

Q. Do you know who prepared it? A. I suppose it was prepared by the legal department. I think you had a hand in it, didn't you?

Q. And recently the contract has been shortened and improved? A. Yes, sir.

Q. And both the shortening and the improvement was as the result of a suggestion of a salesman, was it not? A. That is correct, a salesman in Salt Lake City.

Q. And as the result of his suggestion you gave him a war bond as a prize? A. I did not. Mr. Connors did.

Q. I show you this magazine and ask you what it is.

Mr. Wright: Have you got the improvement there as distinguished from the publicity?

Mr. Caskey: It is right there, Mr. Wright, in the same size type that you use.

A. This is a house organ of our Twentieth Century-Fox (1479)

Company. It is called the Dynamo. It goes out and keeps the boys advised of what we have got, and keeps our enthusiasm alive and tells the record of what they are doing generally.

Q. And this issue of April 21, 1945 contains a reference to Mr. Dugan's suggestion and the new form of contract? A. That is right.

Mr. Wright: Is the contract reprinted in full in here?

Mr. Caskey: The first page, and we will get you a copy of the other.

Mr. Wright: No objection.

William J. Kupper—By Defendant—Direct

(Marked Defendant Twentieth Century-Fox's Exhibit F-10.)

Q. F-10 is the 1945-46 contract, is it not, Mr. Kupper?

A. That is correct.

Q. That is the one currently in use? A. That is the one currently in use.

(1480).

Q. Mr. Kupper, will you tell the Court—

Judge Bright: Are they marked for identification or are they marked in evidence?

Mr. Caskey: It was marked in evidence, I understood.

Judge Hand: As to these forms, the pictures are not listed?

The Witness: Well, when we—during the specific time—right after those long forms, where they had all the pictures on, we did much the same thing as to publicizing the pictures before we sold the exhibitors, and we would go out and sell them, but we would sell so many pictures, say a number in a group, we had maybe seven, we had maybe eight, and this one group had certain specified terms, and ten in the next group had certain specified terms and so on.

Judge Hand: Somewhere the names of the pictures appeared.

The Witness: Yes, they knew the names of the pictures. We gave them a list in the publication that we put out, but it was never definite, we could change the pictures where we wanted, and then later, when you came to the Consent Decree, after, we showed the pictures.

Judge Hand: Yes, that was block booking and you were limited by the consent decree to five.

William J. Kupper—By Defendant—Direct

(1481)

The Witness: That is right, sale of five. Then we showed those pictures and sold people, and the names of those pictures were given, at least those pictures that were licensed.

Q. Referring to F-9 in evidence, would this be filled out? Just give the Court an example of how a contract for a season's product would be filled out. A. Well, of course, the name would go up here and the date and so forth, and then we had—

Judge Hand: This is before the consent decree?

The Witness: This is the one prior to the consent decree, yes, and we, at the same time—there would be eight pictures at such and such terms, right there, and then there would be another block.

Q. Such as what? A. Well, they would generally be our better and higher-priced and more attractive pictures.

Judge Bright: With the names of the eight pictures?

The Witness: No, just the numbers.

Q. Eight at 35 per cent? Is that high enough? A. We have had higher, too, and less, and then there would be ten varying prices, the prices were perhaps a little lower than that, and so on, until the whole contract was completed, and then the last group, we will say, remained there. We never knew definitely how many might be in there, because it would depend upon his selection. We offered so many pictures. That was for him. That is the general front of the contract.

(1482)

Q. The exhibitor knew what he was going to get from the sales advertising material, such as this booklet that I am

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holding and from your past performance? A. That is right, he had confidence in us. We made pictures for a number of years and we developed and we were growing all the time, we were making finer pictures all the time. He believed in us, and that is what we tried to do, to live up to that, what we put out.

Q. And if you told him that you were going to make three Will Rogers pictures in a year, you were able to convince him that those pictures should have the highest term?

A. Yes. In those years, talking about Rogers, he was a pretty good star for us, so was Shirley Temple and other stars, too, but they were generally accepted as our top stars at that particular time.

Q. Referring to the present form, which I had marked as Exhibit F-10, when the application is taken from the salesman, these blanks are filled in, are they not? A. Yes, sir.

Q. With the names of specific pictures? A. Definite name of the picture that he selects out of that group, or all the groups that he so elects.

Q. From time to time you would have this form of contract (1483)

printed up with the names of the pictures in print instead of being typewritten? A. That is right, have them by the thousands and sent them out in advance, and they can use them for any block, just inserting which block it is.

Q. You used this form, as I understand it, for the first sale in each season? A. Yes, sir.

Q. For the exhibitor? A. Yes.

Q. And the subsequent sales of the subsequent blocks is done by even shorter and simpler form? A. Much shorter form. It refers back to this form, where generally all the terms as to clearance and things of that nature are embodied in the first contract.

Q. Mr. Kupper, I wish you would tell—

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Mr. Wright: Have you got the other form he is talking about, that he just testified about?

Mr. Caskey: I will get you one.

Q. I wish you would tell the Court when and how it is determined what pictures Twentieth Century-Fox will release? A. Generally,—last few years I have been associated in New York,—generally, the head of our company goes out to the studio, probably in December, January or February, and he would hold conferences with our production department, and they would discuss the budgets and what the production department has lined up in general as to what (1484)

they thought they should make or were making, and then it was determined whether that program would be suitable or whether it was what we wanted, and if there were any additions or changes made they were made there in those conferences.

Q. Do you participate in those? A. I have, but—in those particular ones, I did not participate very much. They were later ones in which I participated.

Q. You currently participate in these discussions? A. They ask for our opinion and advice as to what we think about future production.

Q. One of the duties of the sales manager is to estimate the expected revenue from the expected picture? A. We try to give them what we believe a picture can earn—at least keep the production department advised of what the possible, potential box office revenue will be from that type of picture.

Q. Am I correct that since the fall of 1941 all of the Twentieth Century-Fox pictures have been trade-shown before they were licensed? A. Well, they were instructed, our branches were instructed, to trade-show every one; and

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I am quite sure that they did, because they had to report to us that they did.

Q. As a matter of fact, you built up a system whereby they were required to report each trade showing, the number of people who attended, and so forth? A. That is correct.

Q. What number of pictures do you sell in the blocks? (1485)

A. Never more than five. As low as one. Sold individually, two and three.

Q. What is the current practice as to the number of pictures in a block? A. We have been running along pretty consistent with two and three.

Q. That requires a separate sale for each two or three pictures? A. It does.

Q. Do you know how many blocks you had in the 1944-45 season product? A. I think we had 11.

Q. That requires 11 separate negotiations with the exhibitors? A. Every block requires a separate negotiation. The salesman may get a small account that doesn't buy early in the season, he may sell two or three blocks, but he has to negotiate each block individually. He may negotiate for two, three or four blocks that are available for sale, that have been trade-shown—he may negotiate it with one sales talk.

Q. That of necessity is in the subsequent-run theatres? A. Subsequent-run, small towns, very small.

Q. How many operating theatres are there in the United States? A. According to the report I have seen from my contract department only this morning, there are over 18,400—some odd.

Q. 18,400 theatres today? A. That is what I believe to be the figure. I have it here, if I may use it.

(1486)

Q. Certainly. A. 18,468 active operating motion picture theatres.

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Q. Does that include Canada? A. It does not include Canada.

Q. How many accounts does Twentieth Century-Fox sell? A. Sold as high as 15, almost 16 thousand; on some pictures.

Q. And as low as how many? A. Run pretty low, 5,000.

Q. Have you a schedule for the week ended October 13th or 20th? A. I haven't got it here.

Q. I will hand you this. For the 1943-44 season what pictures had the highest number of exhibitions? A. Well, in that year "Sweet Rosie O'Grady" was one of the high ones, 15,000.

Q. You may proceed. A. You want me to give you that?

Q. Yes. A. 15,527 actual bookings. "Heaven Can Wait"—of course, these pictures are not finished yet. That particular week, "Sweet Rosie O'Grady", first playing, was 22 more. It has been in release 104 weeks, that is, two years. Still playing.

"Heaven Can Wait" is released 112 weeks. As of this week, October 6th, we had played 15,004 contracts.

Q. And the same— A. There is another picture, "The Sullivans", only released 83 weeks. Had played 15,640 contracts. Here is a picture called "Buffalo Bill," 72 weeks released, and has played about 15,582.

(1487)

Q. With respect to those four pictures were they generally licensed on percentage? A. Yes, generally.

Q. Just give us for those four pictures the number of bookings and the number that were on percentage. A. In "Rosie O'Grady's" case, I stated 15,527 played. Out of that there were 12,203 played on percentage, or a guarantee and a percentage, a participating amount.

In the case of "The Sullivans" played 15,640, 7,980 were played on percentage or participating arrangements; on "Buffalo Bill" it was 15,582 bookings to date, as of this date,

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and we had played 11,404 on percentage or a guarantee and a percentage.

Q. Did you also release during that season a picture called "Dancing Masters"? A. I don't know whether that year. I don't see it on here.

Q. Have you got "Ladies in Washington"? A. "Ladies in Washington," yes, sir.

Q. How many bookings has that had? A. That had 9,651 bookings as of the week ended October 6, 1945, and at that time was released 69 weeks.

Q. How many on percentage? A. 1,145.

Q. What was the comparative quality of that picture? A. There was no comparison. This is not a picture in the category that I read off to you before. This was a smaller picture, and, I suppose, in the trade the term that would be used in the trade, it is a B picture.

(1488)

Q. The better the picture the more accounts it plays, generally speaking? A. Generally, yes.

Q. And the more percentage accounts it plays? A. Yes.

Q. Speaking of "Sweet Rosie O'Grady," did you have prepared a list showing the total number of bookings in the cities of the United States which have a population of 25,000 or more? A. I did.

Q. And did you have the film rental broken down by \$100 classifications? A. Yes, sir.

(Marked Twentieth Century-Fox Exhibit F-11 for identification.)

Q. Mr. Kupper, what was the cost of one positive print of "Sweet Rosie O'Grady"? A. I think in the neighborhood of \$300. It is a technicolor picture.

Q. Look at the exhibit. A. Oh, \$344.29.

Q. And in those 412 cities, how many was the total number of exhibitions? A. 4,063.

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Mr. Wright: Excuse me. Just a minute. These figures are already in evidence in the interrogatory answers. Are these supposed to contradict the figures you gave us in the interrogatory answers or expand them in any way, or are they just the same?

Mr. Caskey: Just the same, except I hope they are more understandable.

Mr. Wright: Have you a copy of it, so we can see
(1489) what you are doing?

Mr. Caskey: Let me ask him another question.

Q. How many of the engagements paid a film rental of \$99.99 or less? A. Looks like 2,800-and-some-odd—out of the 4,000 you are talking about?

Q. Yes. And this list shows a classification by \$100 amount of the film rental that we received? A. That is right.

Mr. Caskey: I will offer it.

Mr. Wright: We object to it until we have had a chance to look at it, and perhaps we may want to cross-examine on it.

Mr. Caskey: Seems hardly a valid objection.

Judge Hand: You object to it?

Mr. Wright: Yes.

Judge Hand: Have they already stipulated what it is?

Mr. Wright: There are certain data of the same character that was furnished us in the form of answers to interrogatories. It isn't clear to me just, without further examination, exactly what has been offered here, what it is supposed to show.

Judge Bright: Isn't it offered to show the rental does not pay for the cost of the print in some 2,000 houses?

Colloquy

Mr. Caskey: That is entirely correct, your Honor.

(1490)

This was prepared, I might say, by the International Business Machines Company.

Judge Bright: That makes it authentic?

Mr. Caskey: Tends to.

Mr. Seymour. We are all going to have some statistical material to offer at some time and I should think—I don't know about this particular one—we should offer them subject to correction. Let them go in and if there are any corrections to be made, let them be made.

Mr. Wright: Obviously it does not seem to me there is anything here which makes one difference one way or the other, but I do think, inasmuch as we have taken great pains to furnish the defendants with all the statistical material long in advance of offering any, as a matter of common courtesy, we should be able to receive in advance of an offer such statistical material as they want to put in.

Judge Bright: How does that prove—

Mr. Proskauer: It is very difficult for us to do that. In my case, I have had to request a vast amount of statistical material in the light of the way the Government's case went in, and we are doing the best we can. We are going to give them to Mr. Wright, but they are all practically just statistics, which are not contro-

(1491)

versial on that basis.

Mr. Wright: I did not hear your comment, Judge Bright.

Judge Bright: What proof is that of the absence or presence of combination or conspiracy?

Mr. Wright: I do not see that it affords any. It seems to me to be completely irrelevant, but I would object to it on that ground also.

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Judge Hand: You have it already in in some form?

Mr. Wright: What we have in, as I understand it, is the total rental and the total number of exhibitions in these towns of this picture. We do not have in, as I understand it, the figure that he testified to as to the total number of those bookings which called for a film rental of less than \$100. As I gather it, that is what it is supposed to contribute that wasn't in the record before.

Mr. Caskey: Shows the necessity for the staggering of runs and for clearance among a large number of accounts.

Judge Hand: We will admit the thing and you can correct it, Mr. Wright. I am not at all sure that it has any bearing on anything.

Mr. Wright: I do not think we have any interest in it, but it is a little difficult to say without seeing it.

(Defendant Twentieth Century-Fox Exhibit
(1492)
F-11 for identification received in evidence.)

Q. Mr. Kupper, what does the term first-run in Baltimore mean? A. It means the showing of our picture, first exhibition to the public in a theatre of our picture in that area, in that city.

Q. What does the term "second-run" mean? A. It means second showing of our picture in a theatre, showing it to the public.

Mr. Wright: May I have that last answer read?

(Answer read.)

Q. "A theatre"? A. "A theatre," yes, second-run. Second run is the second-run and follows the first one.

Q. Not the same theatre? A. Not the same theatre, no.

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Judge Bright: Are there first-run showings simultaneously throughout the different parts of the United States?

The Witness: Very often, your Honor. First-run in this city, first-run in that city. Generally a first-run in every city, even small towns, like, there is a first-run in that town.

Judge Bright: When there is a first running of a picture in Radio City here in New York, are there other first-runs showing in other places?

The Witness: There have been, but, generally,
(1493)

Radio City would be the first run in the United States, but there have been pictures. If we take a picture in, like, the Roxy, which is a similar fine theatre as the Music Hall, we sometimes have the same picture, not the same print, a print of that same picture playing in Los Angeles, in Chicago, and playing in New York, too.

Mr. Caskey: I think I can clear that up for you.

Q. "State Fair" during the fourth week of release, Mr. Kupper, played in how many theatres? A. 318.

Q. Those were all over the United States?

Mr. Wright: Excuse me. Fourth week of release where?

The Witness: Well, it is from the time we tabulate and set it up as a released picture in our books. That would be the United States.

Judge Bright: They are also called first-runs, those 318 houses?

The Witness: I would assume that early in the game they would all the first-run bookings, yes, sir, in that particular week.

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Judge Hand: When you talk about first run that run is the first that there is in a particular locality?

The Witness: That is correct, sir.

Q. And simultaneously with the showing in the Roxy in New York a picture may show in the Fox theatre in (1494)

Michigan, Fox theatre in Philadelphia and the New theatre in Baltimore, some theatre in Atlanta, and another in Kansas City? A. That is right, but it doesn't always follow that way. Sometimes we play—hold a picture and open it at the Roxy and nobody will get it until we sell it to the public, exploit it and let the world know what a great attraction it is.

Judge Hand: You don't call that first-run?

The Witness: Yes, sir, that is first-run. Might be a pre-release or advance.

Judge Hand: That is what you call it.

The Witness: Generally, but it is the first-run showing.

Q. Let us take an exchange area like New Haven, when the picture is released in New Haven Exchange Area, where is it shown first? A. Generally shown in the best theatre in New Haven or Bridgeport. Generally in New Haven is where they start.

Q. Where else? A. Then the other larger towns. May show simultaneously in Bridgeport, Hartford, towns like that, the larger cities. Only have three or four prints in the area and can only show in that many cities.

Q. At the same time that the picture is showing in New Haven and Bridgeport and Hartford, it may be showing in Denver and Pueblo and Colorado Springs? A. That is right. (1494a)

Q. Tell Judge Bright under the pre-consent decree selling, you had a so-called national release date, did you not?

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A. Yes, we had what is termed a national release. It is a fixed date on which we released the picture generally.

Q. And in those days you attempted to have a picture released, generally speaking, simultaneously all over the country? A. In each exchange area, yes, sir.

(1495)

Judge Hand: How can you have a pre-release in New York, Chicago and San Francisco at the same time?

The Witness: You may have it—well, you may have one generally pre-release showing.

Judge Bright: In how many theatres do you give pre-release showings?

The Witness: Well, you can't determine that. For instance, your Honor, we opened up our picture, this State Fair, we opened it up in Des Moines, Iowa, because the picture suited that locality. As a matter of fact, the author of the story, Phil Strong, came from out there. And we had a simultaneous showing in two theatres out there which was long before any other city in the United States—I mean, any general area, got it. Right on top of that, the very next day, what we did in that area, because of its suitability, we sent in and had 65 towns lined up. Well, there are no 65 big towns in Iowa, in the whole State of Iowa, or of the area of Nebraska, which adjoined it, but they played, as far as we could, down the line in the towns so they could get the benefit of all the ballyhoo, as we call it, exploitation. That, to me, would be a pre-release of that particular picture. We started that off, we launched it there. You take another picture, some of ours, the picture we are playing at the Roxy Theatre now. We opened it at the Roxy Theatre. It is now in its fifth week, and that did not

(1496)

play anywhere in the United States. We opened it

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there; we wanted to exploit it, we wanted to sell it by radio and campaign it throughout, so the public would know what a great attraction it was, and the other theatres would know, and that is termed a pre-release sometimes.

Q. What did you do with "Captain Eddie"? A. We took it out to Columbus, Ohio, and opened it out there with a great big outdoor show, I mean we had Rickenbacker there, and a lot of exploitation, and had a lot of newspaper publicity, and we played a lot of towns out in that territory because it was suitable out there, he was well known out there, went through there. It was a pre-release. Happened to be in that area. That played even before New York, and a lot of cities more important and bigger and larger.

Judge Hand: It is beyond me to understand the difference between pre-release and first-run. I don't know that it is important. They seem, when they feel like it, to have an indefinite number of either at the same time.

Mr. Caskey: I think that is correct, sir, and I think that the only difference between pre-release and first-run is the amount of exploitation and fanfare that accompanies it.

Q. Mr. Kupper, how long has the system of successive runs been familiar to you? A. Since I have been with Fox. When I came with them there were still runs. That is 27 (1497) years now, I think.

Q. Were they—— A. 26.

Q. — in the larger cities selling first-runs, second-runs, third-runs, and so on down the line? A. Yes, sir.

Q. And were those runs separated by an interval of time? A. Most of them always are.

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Q. And the interval of time in these days was called protection? A. That is right.

Q. Today it is called clearance? A. That is right.

Q. How long has the industry practice of granting clearance to the prior run existed? A. I believe currently with the run idea. When that was set up, it automatically went hand in hand with it.

Q. Let us have a specific example, New York. Where do you play your Fox pictures first? A. Well, we play most of them, important ones, in the Roxy Theatre. They haven't the time to play them all so we sell them to various theatres. The last three years we sold some, three to the Music Hall, which is an independent operation, we also sold several to the Rialto Theatre, and we sold several to the Globe and the Columbia Theatre, the Victoria Theatre on Broadway.

Q. After they have their first engagement in the Roxy or some other Broadway theatre, where do they next play in the five Boroughs of New York? A. We play at the Albee Theatre in Brooklyn, is the next showing of our picture (1498)

from the Roxy or from most any other house that it might be played first-run.

Q. How long a period of time elapses between the close of the Roxy or the other Broadway house and the Albee?

A. About seven days, I think. Maybe fourteen, but generally seven.

Q. Following the exhibition at the Albee Theatre in Brooklyn, where are the pictures played? A. We then play a number of engagements simultaneously here in New York with the RKO Circuit.

Q. That is in Manhattan? A. In Manhattan, New York.

Q. And the Bronx? A. And the Bronx.

Q. And then the next exhibitions? A. They play subsequent-run houses, RKO houses, and I think in Brooklyn and Staten Island, possibly Long Island—Staten Island anyhow.

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Q. Brooklyn and Queens? A. That is right.

Q. After the picture commenced to play in the RKO neighborhood houses first week in Manhattan, how long then is the picture exhibited in the various theatres in New York?

A. How long is it exhibited?

Q. How many weeks? A. You mean following that?

Q. That is right. A. Generally seven days. Generally run seven days down the line. All runs generally go that way in New York. That is not true everywhere.

Q. About how long does it take to clear pictures through (1499)

all the various theatres that play them in New York?

A. They clear New York faster than they do most territories. I would say maybe seven or eight weeks.

Q. Referring to Exhibit F-10, I notice a space under the schedule headed, "Admission Prices Per Person, Excluding Taxes." In licensing motion pictures to exhibitors is it customary to have those spaces filled in? A. Our instructions are to the salesmen that they must fill it in. Sure, it is customary. Have had a clause for the admission price in contracts away back—I don't know, as far as I can recall. May not be in the same order, in the same set-up, but I remember the admission prices being on contracts for years.

Q. You license, you have already testified, a considerable proportion of your better pictures on percentage? A. Yes, we sell quite a few pictures on percentage. In fact we like to sell every theatre we do business with some pictures on percentage.

Q. Why is that? A. We like to know—we have a right under our contract, to get the box office statement. Know what the theatres can bring in on various types of pictures and we have a pretty good gauge on the business the theatre can do.

Q. Does the information you get when you license the picture on percentage help you in pricing the so-called flat

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(1500)

rental pictures? A. Naturally, your better pictures are accustomed to earning, let us say, hypothetically, two thousand dollars. Well, as you graduate down, that is what your best pictures can earn, there is certainly some relationship between the box office value down to the next group, down to your last flat film rental, and you cannot expect a cheap B picture, like *Ladies in Washington*, to get \$2000 if your fine pictures can only earn \$2000 on percentage.

Q. Does the knowledge that the best pictures will earn \$2000 on percentage aid you in the pricing of your pictures?

A. I would say it does.

Q. When you negotiate a license with a first-run exhibitor, say in Baltimore, how is the admission price that is to be inserted in the contract to be agreed upon? A. Well, admission price, you generally know what the man is charging, he generally establishes his own admission price, and unless you are selling a picture that you are going to insist on getting an advance admission price for, you usually accept what he generally charges because he has established that as the best price that that area or that theatre can sell the merchandise to the public at, and we usually let his judgment guide us, his knowledge.

Q. You have an interest in that price? A. Oh, definitely.

Q. And an interest that it shall be the price which will (1501)

attract the largest patronage? A. Yes, sir.

Q. One of my associates says the largest number of patrons at the largest price they will pay? A. Yes, sir, that is right.

Q. What exactly that figure is is ordinarily left to the judgment of the exhibitor? A. I would say in most every case it is that—most cases.

Q. In each of those cases the salesman and usually the branch manager, at least in the more important situations, is

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familiar with the price which is being charged? A. I would say he is, yes.

Q. At the time the agreement is made with the first-run exhibitor, let us say for example Baltimore, as to the admission price that he will charge during the engagement of the pictures which are licensed to him, what agreement is reached with him as to what other exhibitors will have to charge when they play your pictures? A. I don't believe any.

Q. When you go to the second-run exhibitor in Baltimore, do you negotiate as to what admission price he will charge? A. No, sir—I mean that he will charge?

Q. Yes. A. Of course, you know it is the same thing as the first-run, you are interested in what he is going to charge you for your pictures, I mean, what he is going to sell them (1502)

to the public for. It is the same situation right on down the line, on third, fourth and seventh runs.

Q. With each succeeding run you make that contract as to the admission price which that exhibitor will charge? A. Well, that is; you take the price that he has set up and established in his theatre, and that is what you agree is the admission price generally for what you are going to sell your merchandise in that theatre for.

Q. But at each level, at each run, you have an interest in the price which he will charge? A. Yes, sir, definite interest. (1503)

Q. Because, obviously, 40 percent of 30 cents is greater than 40 per cent of 20 cents? A. Right.

Q. At each one of these negotiations is there any agreement reached as to what price you will require the succeeding run, the following run to charge? A. No, not that I know of.

Q. You haven't made any such agreement? A. No, sir.

Q. It appears in the evidence that in some of the cities of the United States the clearance provision will read something like this, 21 days over houses charging 35 cents, 35 days over

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houses charging 30 cents, 42 days over houses charging 25 cents, 73 days over houses charging 20 cents. You know of such contracts? A. Yes.

Q. And you enter into those contracts with the first-run exhibitor, do you? A. That is what you agree that you are going to grant him, that clearance, that much between those specific price houses, which are less admission than you get from him.

Q. When you go to the second-run, having made such a contract with the first-run exhibitor, is there any maximum, is there any limit on the maximum price which that second-run exhibitor may charge? A. No. If he is playing my pictures on percentage, I would like him to charge even more than we agree to in the contract. We can get more.

Q. Taking my specific case, where the clearance with the (1504)

first-run exhibitor reads 21 days over 35-cent houses, now, you go to negotiate with your first choice for a second-run exhibition? A. Yes.

Q. Is there any limitation on the maximum price he may charge? A. No.

Q. Charge 35 cents or any other price he wants to charge? A. If he can charge more, he may charge more. I wouldn't object.

Q. So far as you know, the first-run exhibitor wouldn't object? A. I don't believe he would. I think he would be very happy.

Q. But if the exhibitor wants to charge less than 35 cents, then you have to move his clearance back? A. If he reduced it, I would certainly move him back. You would have to move him back.

Q. If he wants to play 21 days after first-run he has to charge a minimum of 35 cents? A. That is right.

Q. And if he is not willing to charge that price and wants to charge 30 cents, then, in my example, he would play 42 days after? A. That is right.

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Q. And if he wanted to charge only 20 cents, he would play 70 days after? A. 70 or 80, depending on what the figure is.

Q. In many other cities of the country the clearance simply reads, in the favor of the first-run, a specified number (1505) of days over all other runs in the city, is it not? A. That is right.

Q. In granting clearance to the first-run theatre, is there any difference between the theatres which are operated by some one of the defendants in this case and theatres which are operated by what have been called independents? A. I missed the first couple of words of your question.

Q. (Read.) A. Oh, we treat them all alike, whether independent or an affiliated. The clearance has got to be worked out and settled and solved. There is no rule of thumb for any clearance anywhere and depends on the locality. Matter of negotiation.

Q. I show you several sheets which are in evidence as a part of Exhibit 41 and Exhibit 42. Calling your attention now to the City of Akron, Ohio, the first-run pictures are sold to an independent? A. Yes, sir, Shea Theatres. Used to be Pfeiffer & Shea.

Q. What clearance do you grant the first-run there? A. 42 days over subsequent-run, 30 days over Cuyahoga Falls, Barberton, Kenmore, and 14 days over Kent and Ravenna.

Q. Next sheet. A. This is Washington.

Q. Baltimore, Maryland. A. Baltimore, Maryland.

Q. Sell independent there? A. We do. Mr. Marcus Mechanic, who operates the New theatre.
(1506)

Q. You grant clearance? A. Yes.

Q. What is the clearance? A. First run in Baltimore, Maryland, 21 days over all subsequent run. Within 30 days of availability.

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Q. And the next city? A. Camden, New Jersey.

Q. Whom do you sell there? A. Mr. John Varbalow.

Q. Is he an independent? A. Yes, sir.

Q. What is the clearance there? A. 14 days after—wait a minute. This is first-run Camden. Exhibitor to play pictures 14 days after first-run Philadelphia, 14 days clearance on all theatres situated at Camden, Gloucester, Cumberland, Burlington and Salem Counties, and the town of Hammon-ton, New Jersey.

Mr. Caskey: I have selected out of the exhibit, but I will not have read, but I would like the stenographer to copy it, the clearance in Canton, Ohio; Elizabeth, New Jersey; Erie, Pennsylvania; Fall River, Massachusetts; Fort Wayne, Indiana; Jersey City; Louisville; New Bedford; Providence; Reading, Pennsylvania; Richmond; Utica, Wilmington, Delaware; Nashville, Tennessee.

Mr. Wright: Excuse me. Is there anything you are asking him to copy that is not already in evidence in the interrogatory answers?

Mr. Caskey: I am asking him to copy from the interrogatory just the clearance so that it will be in
(1507)

the stenographic minutes and not buried in those enormous books where it is utterly inaccessible to anybody.

Mr. Wright: It seems to me it is hardly necessary for him to have them copied in the record. If he wants to use them in the briefs, he may call them to the Court's attention. They are right in evidence.

Mr. Caskey: I want examples in the stenographic minutes. I can either ask the witness specifically about them or I can have them copied, whichever you prefer, Mr. Wright. It is a matter of indifference to me.

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Mr. Wright: I have no objection to having them copied. I am just making the suggestion to try to keep the record within bounds.

(The matter referred to is as follows:)

"Canton, Ohio. First run Canton, Ohio—Thirty (30) days clearance over second run Canton, Ohio.

Elizabeth, New Jersey. 14 days after first run Newark. First run in Elizabeth. 21 days clearance on all theatres in Elizabeth and Elizabethport. 14 days clearance on all theatres in the towns of Hillside, Westfield and Elmora. 7 days clearance on all theatres in the towns of Cranford, Lindon and Rahway.

Erie, Pennsylvania. First run, Erie, Pa. (28) days ahead of subsequent runs and Yesleyville 14 days ahead of Northeast, Girard, North Girard, Albion, (1508)

Union City, Cambridge Springs.

Fall River, Mass. First run on release. 28 days clearance over Capitol. 35 days over Park and Strand. 90 days over Plaza and Royal.

Fort Wayne, Indiana. 1st run. 60 days clearance over 2nd run. 14 days clearance over Churubusco, Huntington, New Haven, Kendallville, Decatur, Columbia City, Garrett, Auburn, Bluffton, Albion, South Whitley and Hicksville, Ohio, providing played within 30 days after National release date. To be played at the rate of one per week as and if available starting approximatey September 1943.

Jersey City, New Jersey. Pictures to become available 7 days after completion of the first run New York City engagement. First run in Hudson County. 14 days clearance on all theatres in Jersey City.

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Louisville, Ky. 1st run. 56 days clearance over subsequent runs. 14 days clearance over all towns within a radius of 25 miles. To be played at the rate of one per week, as and if available starting approximately 9/1/43.

New Bedford, Mass. 60 days over second run. 30 days over Fairhaven.

Providence, R. I. On release 21 days clearance over 1st run Pawtucket & Woonsocket; 30 days clear-

(1509)
ance over Empire, Columbia, Uptown and Liberty Theatres, Providence, also Centerdale, E. Providence, Mt. Pleasant, Riverside, Auburn and 50 days over Olympia Theatre, Olneyville, 30 days clearance over Hope Street Theatre, 1 day clearance over Wakefield, 14 days clearance over Palace-Arctic, Bristol, Warren, E. Greenwich, Foxboro, Mansfield and Attleboro.

Reading, Pa. 28 days clearance on all theatres in Reading. 7 days clearance on Pottstown, to play when and as available.

Richmond, Va. 1st run Richmond, Va. 45 days protection from last playdate, over all theatres in City of Richmond, Va., as available.

Utica, N. Y. 1st run—30 days clearance over subsequent runs in Utica, and within a radius of 15 miles of the Olympic Theatre.

Wilmington, Del. 1st run Wilmington, Del.—21 days clearance over all subsequent runs after second week.

Nashville, Tenn. 60-day clearance over second run."

Q. Now, in granting clearance to first-run exhibitors in the United States is there any distinction made by you between affiliated and independent exhibitors? A. No, sir.

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Q. So far as you know, does every so-called first-run exhibitor take clearance over the theatres in his competitive area? A. They do.

(1509a)

Q. When you come to the second-run theatres, is there any distinction made as to affiliated or independent theatres in the granting of clearance? A. No, sir.

Q. So far as you know, do all the second-run theatres take clearance over subsequent-run theatres? A. I believe they do.

(1510)

Q. And in those towns where there are four runs, does the third run take clearance over the fourth run? A. Generally; and if you would go on to the seventh or eighth, it would be the same story. The fellow ahead wants his protection, he wants his clearance before the next fellow was going to play it.

Q. Now, Mr. Kupper, I want a word about the area over which clearance is granted. Do you know what the area of clearance is for the Music Hall or the Roxy? A. Well, the area varies. The Roxy and the Music Hall take a larger area than another theatre might take. They are palaces, they are show places, palaces, and by virtue of that alone they attract a greater attention and a greater public interest, and it naturally would spread out further than a small theatre.

Q. Now, the Roxy takes clearance directly or indirectly over all of New Jersey, does it not? A. I am not so sure that it takes all of New Jersey, but it takes it over a considerable part of New Jersey.

Q. It takes clearance over Newark? A. Yes, sir.

Q. And it gets clearance over all of the cities that Newark takes clearance over? A. Yes, that is right.

Q. It takes clearance to the east as far as Stamford? A. Yes, sir, it does, and out in Long Island, out through there; way out in Long Island it takes clearance over.

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(1511)

Q. Do you know whether it takes it even over Suffolk County? A. I do not think it goes in through Suffolk County, but it does for Nassau County; I know definitely about that.

Q. Now, what is the justification for that extensive area of clearance? A. Well, first of all, they get a pretty good admission price, a much higher admission price than is generally paid by any other theatres in the country; and as I say, they are tremendous institutions, and they have been developed as such, just their appointments alone, and they generally have the first showing of a picture in there, they are entitled to that, and to get that; that is another means by which they can maintain that terrific high admission price, so we, in turn, can get a proper film rental, a film rental in keeping with the terrific costs that we have in production. Without being able to get that kind of revenue you would not be able to have that kind of pictures.

Q. Now, as to the extent in time of clearance, you testified, I believe, that the Roxy takes only 7 or 14 days clearance as far as time is concerned? A. That is what the contract specifies.

Q. I noticed in examining Exhibit 41 and 42 that in Baltimore the clearance is 21 days between first-run and second-run. A. Yes.

Q. Why should it be larger than it is between the Roxy (1512)

and the Albee Theatre in Brooklyn? A. I will tell you, there is no rule of thumb on any of this clearance. It has all been worked out locally, and all these local conditions and the competitive situation have a lot to do with it; and each one is a separate problem of its own.

Q. It is also true, is it not, that generally speaking the periods of clearance are longer in the smaller cities than they are in the larger cities? A. That is correct.

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Q. Is it true that the clearances in the middlewest, southwest, tend to be longer than they are in the east? A. Yes, much more.

Q. Why is that? A. Well, you know, the population isn't so great out there, and it is nothing uncommon for somebody in Oklahoma who lives maybe 40 or 50 miles away from Tulsa, Oklahoma, to drive in to see a picture. The form of amusement and entertainment is not like it is in a city like New York, or something of that nature; so they draw from a great area. They may be sparsely settled and may be small population, and the theatres that generally follow those are not such good theatres either, in those little communities, and they draw from them, naturally.

Q. Mr. Kupper, is it the practice in the motion picture industry for the distributor to grant clearance to a large town over theatres in a smaller town within a reasonable geographical area? A. Yes, especially if they are considered (1513) competitive. And they generally are competitive.

Q. The theatre, the first-run theatre in the county seat down in Ohio or Missouri takes clearance over theatres in the smaller towns? A. Around that area, yes. It does not have to be a county seat. It can be a more important, a bigger situation, and it is going to take clearance over a smaller situation.

Q. Even though it is a separate political subdivision? A. Yes.

Q. A separate city? A. Yes.

Q. So you have the large showcase windows, like Roxy, taking clearance over a wide metropolitan area? A. Yes.

Q. Then you have clearance in each competitive area of the theatres over the other? A. Yes.

Q. And you also have clearance of the larger towns over the smaller towns? A. That is right.

Q. And was it the purpose of your company in 1940 in agreeing to Section 8 of the consent decree to create a

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machinery whereby disputes as to the width of the area or the length of the time of the clearance could be settled by an outsider?

Mr. Wright: If the Court please, the decree speaks for itself. It is in the record. I do not think this witness's testimony as to its purpose adds anything.

Judge Hand: All right, I will sustain the objection.

(1514)

Q. Now I come to the problem of the selection of a customer: I believe you testified that in 1922 you went to Albany as branch manager? A. Yes.

Q. That was in the days of silent pictures? A. Yes, sir.

Q. When you got there was there a customer for Fox pictures already in existence? A. There was.

Q. Who was it? A. I think the man's name was Elliott, John Elliott. He had what was called the Clinton Square Theatre; it was an old church, renovated; an upstairs house, as a matter of fact. You had to walk up quite a flight of stairs, which is unusual for a theatre.

Q. How many first-run theatres were there in Albany in 1922? A. Well, I think there were three; maybe four. Four. I guess there were four.

Q. Now, what happened to Mr. Elliott's theatre? A. It was obvious it could not go on. It had to be torn down and rebuilt. He went out of business. He sold it and walked away from it.

Q. Then what happened? A. You mean with our product?

Q. That is right, Fox's product. A. We tried to get a new customer, and we did succeed in getting a new customer.

Q. Who was that? A. I believe we sold an independent fellow called Buckley, Chris Buckley. He had one and he

(1515)

acquired another theatre, Harmonis Bleecker Hall, and a theatre called Leland.

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Q. How do they compare with the other theatres in the town? A. Well, the two houses were better, I would say, in those days that were owned by Moe Mark, the Strand, and I believe RKO or Proctor's had a theatre in there in those days, vaudeville and pictures.

Q. That was before RKO was formed? A. Well, before RKO; but Proctor's.

Q. Why didn't you sell your pictures to Proctor's or the Strand Theatre? A. I don't think we could. We tried, I know we tried to sell Moe Mark. I know I sold him my newsreels but I could not sell him my feature. I tried.

Q. He did not want to buy? A. No; he had enough product, product he liked better than mine.

Q. So you sold to Buckley and the Leland? A. That is right.

Q. Then what happened, if you recall? A. Well, later on Buckley, he sold his theatres to RKO—I think they were back in existence then—I think he sold them or made some sort of a pooling arrangement, and we continued supplying our product to them; and then—do you want me to go right on up to date?

Q. Yes. A. Then they made some sort of arrangement with a man called Fabian, who now operates the two theatres (1516)

atres up there, and I think he has got some arrangement with the two Warner houses; but the picture kept flowing right there, from the same customer, you might say, from the beginning, who just either pooled or sold it; but they went through those theatres; and we eventually got into better theatres by virtue of the development.

Q. And the customer whom you now offer your pictures to in Albany is the successor of Chris Buckley's operation? A. Well, we have a split of our product in Albany.

Q. Yes, I understand. A. I think we sell two-thirds to Mr. Fabian, who has the best house, incidentally, and one-third Warner's.

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Q. But am I correct in saying that the customer that you now serve, at least the Fabian that you now serve, is the development right straight through from Chris Buckley?

A. I would say that is the historical development right up to date.

Q. And generally speaking, has there been some such historical development in every city in the country? A. I would say so, yes, sir. I know as far as our company's pictures and product is concerned that is so.

Q. Now, without disparaging the product at all, in the early 1920s what was the relative standing of the Fox product? A. Well, it was not as good as some others and some were better than others. It was just one of those things. (1517)

We made a different type of merchandise. We made more of the action type, melodramatic type. We did not go in for the serious dramas in those days, although we had some. We did not have the star value that some of the other companies had. It might have been considered perhaps inferior than other products.

Q. And as you sold your product throughout the country were you able always to license it to the best theatre in the town? A. No, we were not.

Q. Or to get the highest terms from that theatre? A. No, sir, though we tried.

Q. Then what did you do with it? A. Sold it to the next best one we could sell, get our revenue back and make a profit for our company.

Q. Now, Mr. Kupper, it has appeared that many of these theatres in these larger cities play for at least one week. Are there any weeks of the year that are better than others in the motion picture business? A. Yes, sir, certainly there are. Any week that has got a holiday is better than any other week or some other weeks that have not got a holiday:

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Q. And is the week that contains Columbus Day better than the succeeding week? A. If it does not have a holiday, yes, certainly.

Q. And if you have a picture of high quality, do you (1518)

attempt to secure bookings for that holiday? A. If it is released then, I do. I attempt to get the best time for every picture, but particularly when there are holidays I go out to get that, plenty of time in advance. I want to be protected. In other words, I want now to be set up for Christmas, not only Thanksgiving but Christmas. I am looking ahead for that week.

Q. There are none of your rivals in the courtroom, are there? A. Well, they are doing the same thing.

Q. Are there certain weeks in the year to be avoided? A. Yes, sir, definitely. Holy Week and the week before Christmas. They are two outstanding weeks to keep away from.

Q. And do you try not to have your better pictures shown those weeks? A. I try to and I avoid it if possible.

Q. Now, in the theatres which change twice a week, is there such a thing as preference as to what part of the week you will play? A. I have a preference.

Q. What is that preference? A. It is the weekend playing time, Saturday and Sunday playing time.

Judge Hand: We have had this and had this. What good does it do to keep repeating this?

Mr. Caskey: Well, the purpose of repeating it is that the charge is conspiracy and a combination to restrain trade; and each of us in the absence of some (1519)

concession from the plaintiff is under a duty to show that far from restraining trade we compete for it. I realize that it must have a very familiar sound by now.

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Judge Hand: It certainly does.

Mr. Caskey: It is third-run, I realize, but it is equally true. And if you will recall just a few moments ago when I tried to get a concession, Mr. Wright too refused to make it as to the affiliated theatres. He still contended that the playing time instead of being competed for was divided or arranged in some manner that I do not quite comprehend. That is the reason and the only reason for the inquiry. If we have any limitation of issues, why, we can limit the examination.

Judge Hand: Go ahead.

By Mr. Caskey:

Q. Now, Mr. Kupper, does this competition or this seeking of preferred time apply in the cities in which National Theatres operates as to Fox product? A. Certainly it does.

Q. Do you attempt to get from the theatres of National preferred playing time? A. I attempt and I fight for it.

Q. And you get it? A. Not always. Sometimes. But I fight for it.

Q. Now, does the effort to get preferred playing time occur in the cities in which one of these defendants has all (1530)

of the theatres? A. Yes, sir.

Q. Does it occur in the cities in which more than one of the defendants operate? A. Yes, sir.

Q. Is there any distinction? A. No distinction whatever.

Q. And does it apply in theatres where your customers are so-called independents? A. It certainly does apply. It applies everywhere. I want important playing time and preferred playing time every time I can get it and as often as I can get it.

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Q. And does the amount of preferred playing time that Mr. Friedl will give you in Minneapolis have any relation to the amount of preferred playing time that Mr. Fitzgerald will give the Paramount in Milwaukee? A. I would say none whatever.

Q. Did you ever hear of the suggestion before? A. No.

Q. In seeking preferred playing time from the Loew theatres in Columbus, is it measured by the preferred playing time which a subsidiary of National gives the Loew product in Los Angeles? A. I never heard of it being and never thought it was, and never knew it could be.

Q. It has never been discussed? A. Never.

Judge Hand: How much more have you got for this witness?

Mr. Caskey: Oh, considerable.

Judge Hand: All right. We will adjourn until tomorrow at 10.30.

(Adjourned to October 30, 1945, at 10.30 a.m.)

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(1521)

New York, October 30, 1945, 10:30 a.m.

Trial resumed.

Mr. Whittlesey: If your Honors please, before Mr. Caskey continues with his witnesses, there is a development in the case of the RKO defendant which I felt I should advise the Court about at the opening of court. We are scheduled to go on with our witnesses immediately following the conclusion of the testimony for Fox. I understand that Mr. Caskey expects to finish some time today with his witnesses. Mr. Leisure, who is to conduct the defense for RKO, advises me this morning that he is in bed with a fever of 101 and will not be in a position to go ahead today, but hopes to be by tomorrow. So if it becomes necessary for us to go ahead today, I am afraid we will have to ask the Court's indulgence for a little more time.

WILLIAM J. KUPPER, resumed the stand.

Direct Examination Continued by Mr. Caskey:

Q. Mr. Kupper, I want to dwell for a moment on this subject of simultaneous first-run exhibitions throughout the country.

(1522)

(Defendant Fox's Exhibit F-12 for identification marked.)

Q. I hand you a schedule which is marked Defendant's Exhibit F-12 for identification, and ask you what that contains? A. It is the film rental that we earned on a picture

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called a Tree Grows in Brooklyn, which played first-run and extended engagements in the 92 cities with a population of more than 100,000. It shows the exact revenue, it shows the percentage of the revenue.

Q. Does it show for each city the exact play dates when the picture played first-run in those cities? A. Yes, it does.

Q. If there was a move-over or carry-over, does it show the dates of that exhibition? A. It does.

Q. And the name of the theatre? A. The name of the theatre.

Q. Then it shows the precise film rental received? A. Right.

Judge Bright: Is this all first-run?

Q. Mr. Kupper, this is first-run only? A. First-run showing only.

Q. In the 92 cities with a population of 100,000 or more? A. That is correct.

Q. On the front of it is there a recapitulation of the revenue? A. Yes, sir.

Q. How much do you anticipate the total revenue from (1523)

all exhibitions in the United States in all theatres will be? A. \$3,375,000—slightly better.

Q. How much has actually been received? A. As of the week ending October 13th—15th, I think it is.

Q. 13. A. 13, we have received \$3,175,554.

Q. In the regular course of your business are you able to estimate the amount of additional revenue which will be received after October 13th? A. Yes, sir.

Q. And you estimate that as how much additional? A. About \$200,000 more.

Q. In the aggregate, how much revenue was received from the first-run theatres in the 92 cities? A. \$966,894.45.

Q. That is what percentage of the total anticipated domestic revenue? A. 28.62 per cent.

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Q. That is slightly more than one-quarter of the total revenue you expect to receive? A. That is correct.

Q. Turn over to New York, and tell me how much revenue came from the Roxy Theatre? A. The Roxy Theatre opened its engagement on February 28th and played through April 10th, a period of six weeks. Our total film rental for that engagement was \$175,300.

Q. Lumping the exhibition at the Roxy Theatre with the exhibition in those theatres operated by National, which played first-run, what was the total revenue received? It is on the recapitulation. A. I think it says it here, \$416,704.15. (1524)

Q. What percentage of the National anticipated revenue is that? A. 12.34.

Q. The Roxy is sold separate from the subsidiaries of National, is it not? A. Yes, sir.

Q. How much of the revenue was derived from the first-run theatres operated by Loew? A. \$72,919.18.

Q. That is what percentage of the National anticipated gross? A. 2.16 per cent.

Q. How much of it was received from theatres which are affiliated with RKO? A. \$40,192.43.

Q. What percentage of the national anticipated revenue is that? A. 1.19.

Q. Treating together the various theatres in which Paramount has an interest, except those located in Oklahoma City, how much revenue was derived from those theatres? A. I think you also want to exclude Butterfield, too.

Q. Excluding the Butterfield circuit? A. \$191,178.58. (1525)

Q. And treating that together for the purpose of this discussion, what percentage is that of the national revenue? A. 5.66 per cent.

Q. Now, what did you receive from the theatres in Oklahoma City? A. You are referring to Standard Theatres?

Q. Yes. A. \$4,230.45.

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Q. Who operates those theatres? A. Joseph Cooper. Standard Theatres Company.

Q. And what percentage of the national revenue was that? A. Less than one per cent. .12.

Q. 12/100ths of 1 per cent? A. That is right.

Q. Now, what did you receive from the Butterfield Circuit? A. \$6,813.46.

Q. And what percentage of the national revenue was that? A. .20.

Q. 21/100ths of 1 per cent? A. That is correct.

Q. Now, what revenue did you receive from the Skouras Theatres that operate first-run in the 92 cities? A. \$19,467.14.

Q. And that is what percentage? A. 57/100ths of 1 per cent.

Q. And then the Warner Theatres? What amount of revenue? A. \$56,172.58.

Q. And what percentage is that? A. 1.66.

Q. And how much did you receive from first-run theatres (1526)

in which the defendants have no interest? A. \$159,216.48.

Q. And what percentage was that? A. 4.72.

Mr. Caskey: I offer the schedule.

Judge Bright: Mr. Caskey, may I inquire just what the point of that particular exhibit is?

Mr. Caskey: As I understand it, sir, there is a charge of monopolization of the first-run theatres in these 92 cities, and the point of this exhibit is that the first-run revenue which we received from the theatres operated by the four co-defendants is only 11 per cent of our total revenue, the minimum.

Mr. Wright: We have no objection, providing, I take it, the whole exhibit here is being offered, not just the items you are questioning him about?

Mr. Caskey: The whole exhibit, yes.

Mr. Wright: No objection.

Colloquy

(Defendant Twentieth Century-Fox's Exhibit F-12 for identification received in evidence.)

Mr. Caskey: Will you mark this for identification, please.

(Marked Defendant Twentieth Century-Fox's Exhibit F-13 for identification.)

Mr. Caskey: May I have your Honors' leave to have the stenographer copy the recapitulation into (1527) the stenographic minutes?

Judge Hand: Yes.

(Recapitulation referred to is as follows:)

(1528)

FILM RENTAL "TREE GROWS IN BROOKLYN"

FIRST RUN AND EXTENDED ENGAGEMENTS

92 CITIES WITH MORE THAN 100,000 POPULATION

RECAPITULATION

	REVENUE	% FIRST RUN REVENUE	% U. S. GROSS AT OCT. 13	% OF ESTIMATED U. S. GROSS
PARAMOUNT AFFILIATES	\$191,178.58	19.77	6.02	5.66
SKOURAS THEATRES	19,467.14	2.01	.61	.57
NATIONAL THEATRES (Including ROXY-N.Y.C.)	416,704.15	43.11	13.12	12.34
LOEWS	72,919.18	7.54	2.30	2.16
WARNER BROS.	56,172.58	5.81	1.77	1.66
{STANDARD THEATRES {(PARAMOUNT-WARNER)	4,230.45	.44	.14	.12
INDEPENDENTS	159,216.48	16.47	5.01	4.72
R.K.O.	40,192.43	4.15	1.26	1.19
PARAMOUNT PUBLIX and R.K.O. (BUTTERFIELD)	6,813.46	.70	.22	.20
GRAND TOTAL	\$966,894.45	100%	30.45%	28.62%
TOTAL FILM RENTAL TO OCTOBER 13, 1945 U. S. ONLY.....				\$3,175,554.00
ESTIMATED FILM RENTAL TO END OF LIQUIDATION PERIOD U. S. ONLY				\$3,375,554.00

William J. Kupper—By Defendant—Direct

(1529)

By Mr. Caskey:

Q. Mr. Kupper, have you caused to be made up a chart showing the days when "Tree Grows in Brooklyn" played first-run in the 92 cities? A. That is right.

Q. And that was made up from the data which is contained on Exhibit F-12? A. Yes, sir.

Q. I show you these four sheets marked Defendant's Exhibit F-13 for identification, and explain to the Court what it is. Just stand up and explain it. A. Well, it shows, as I mentioned; the opening date at the Roxy Theatre, which was March 28—

Q. February. A. It says March—I beg your pardon, February 28; and runs through the period to April 10th. Now, that was the first engagement we had, that opening date; and, incidentally, on every one of these sheets it will show all the other towns, giving their opening date. For example, the next line here following New York, the New York engagement, shows that in Chicago we opened the picture on March 17th and ran through April 25th.

Incidentally, in Boston it shows we opened the picture on March 15 and played through the 28th.

The next town shows New Orleans, we opened the 12th of April and played through the 20th. But what this shows is that while New York had started on the 28th of February, while it was showing there it also opened in Chicago, as I (1530)

mentioned, on the 17th; and while it was playing in New York it also opened in Boston. It did not open on the exact same opening date as it did in New York, but it opened a few days later, or a week or so later. In Minneapolis it opened on the 16th, and so on down; in each town it shows

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the opening date; and a great many towns were playing it while it was being played in New York.

Q. And wherever you draw a straight line down, each one of the red spaces it hits it shows a simultaneous exhibition? A. Yes.

Judge Bright: These were all first-run?

The Witness: Yes. There are 92 towns that are mentioned in this complaint; and it is the history of the opening date and the sequences in which it played in those towns.

Judge Bright: Is that particular picture, Tree Grows in Brooklyn, a typical picture?

The Witness: Yes.

Judge Bright: Illustrative of this situation?

The Witness: I would say so, yes. And that is an important picture.

Q. And by the first week of April 30 or 40 cities were playing the picture simultaneously? A. I did not count them up, but I can quickly. I would say so; about that many.

(1531)

Q. And some of the theatres which were exhibiting the picture at the same time that it was playing in New York were affiliated with the defendant Paramount on the first list? A. Yes, sir.

Q. And some with Loew's? A. Yes, sir.

Q. And some with independents? A. Yes, sir.

Judge Bright: Have you marked those that were played with independents?

The Witness: It is very easy. It can be marked.

Mr. Caskey: Well, let us do it right now.

Q. Pittsburgh. A. Independent. I will just put it alongside the name of the town.

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Judge Bright: Put "Ind."

The Witness: Yes

Q. Richmond. A. Independent.

Q. Miami. A. Independent.

Q. Norfolk. A. Independent.

Q. Trenton. A. Independent.

Q. Camden. A. Independent.

Q. Erie. A. Independent.

Q. Wilmington. A. Independent.

Q. Reading. A. Independent.

Q. Utica. A. Independent.

Q. New Bedford. A. Independent.

(1532)

Q. Fall River. A. Independent.

Q. St. Louis. A. Independent.

Q. Akron. A. Independent.

Q. Canton. A. Independent.

Q. Tulsa. A. Independent.

Q. Louisville. A. Independent.

Q. Indianapolis. A. Independent.

Q. Gary. A. That is not shown here. It is not specified.

I do not know what the date is. It is left blank.

Q. Fort Wayne. A. Independent.

Q. Baltimore. A. Independent.

Q. Providence. A. Independent.

Q. Tacoma. A. Independent—independent, definitely.

Mr. Caskey: I offer Exhibit F-13 for identification in evidence.

Mr. Wright: I have no objection.

(Defendant Twentieth Century-Fox's Exhibit F-13 for identification received in evidence.)

Judge Hand: There was no such chart offered for Paramount, was there?

Mr. Caskey: Showing the Paramount theatres?

Colloquy

Judge Hand: Yes.

Mr. Caskey: Yes—

Judge Hand: No, I mean by Paramount.

(1533)

Mr. Seymour: No.

Judge Hand: Mr. Seymour says no.

Mr. Seymour: There was no such chart. But you will remember the testimony which was based upon an exhibit not showing the simultaneous first-runs, but the fact that Paramount Pictures were furnishing first-runs in a number of cities to independent exhibitors.

Judge Hand: Oh yes, I remember that. I should think it would be a good thing for the different defendants to have such a chart. It would be easy enough to get it up.

Mr. Seymour: If your Honor is interested in that we will do that.

Judge Hand: Mr. Caskey has got it here, and we can compare them.

Mr. Proskauer: I did not exactly get your Honor's suggestion.

Judge Hand: Well, I thought it might be well to compare these first-runs with independents and with the defendants. Mr. Caskey has introduced this chart. Nothing was introduced of that sort—that is, no chart like that—by Paramount. I suggest that it might aid us to have such charts introduced by the various defendants.

Mr. Davis: May I see Mr. Caskey's chart there, please?

(1534)

(Chart handed to Mr. Davis.)

Mr. Davis: Your Honor will remember that Loew's introduced a chart showing the derivation of revenue

Colloquy

on the typical film "As Thousands Cheer" showing how much of the first-run came from the defendants and the independents, and so on; but this chart, I take it, is a chart of time, not revenue; isn't it, Mr. Caskey?

Mr. Caskey: Yes, sir.

Mr. Davis: We shall be very glad to duplicate this.

Judge Hand: Of course, it is up to you whether you think it is worthwhile. I cannot remember very much of the details in this case. It is a complicated sort of case as to what has passed, and I certainly cannot foresee what is coming. I merely made this suggestion.

Mr. Davis: This is very easily done. We would be glad to do it.

Judge Hand: If you all made similar charts we could compare them.

Mr. Davis: I can see how that might save some confusion here. I may say that for our side—and I do not say this by contrast with any of my brothers—I am studiously endeavoring to compress the case I want to present into the smallest possible compass.

Judge Hand: Yes. Are you going on when Mr.

(1535)

Caskey finishes.

Mr. Davis: I won't be ready to go on immediately; but I will say that at the moment it is not my intention to call any other witnesses, but I have some documentary matters which I shall want to present. While, as I say, I do not expect to call any witnesses, I have a stipulation which I shall offer to Mr. Wright when I have completed it as to the testimony of a witness if he were called.

Judge Hand: Yes.

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By Mr. Caskey:

Q. Mr. Kupper, returning for a moment to the subject of clearance, who determines the length of the clearance to be granted a prior-run exhibitor? A. Well, we determine that.

Q. And who determines the length to be granted to each succeeding run? A. We determine that.

Q. Who determines the area of the clearance? A. We determine that.

Q. Is clearance something that is sold? A. It is part of your negotiations; a definite part.

Q. Now, Mr. Kupper, it appears in evidence that subsidiaries of National Theatres Corporation licensed pictures from the defendants in this case. What are the National Theatres? A. The National Theatres are a company operating a lot of theatres that I assume belong to our company, (1536)

Twentieth Century-Fox.

Q. At one time it was known as Wesco? A. As Wesco.

Q. And one of its principal subsidiaries is Fox West Coast Theatres? A. Yes.

Q. The president of National Theatres is who? A. I thought Charles Skouras was president.

Q. Now, it appears in evidence that National Theatres licensed pictures, or its subsidiaries do, for exhibition in their theatres from Loew's. Do you have any knowledge of the terms upon which those subsidiaries license pictures from Loew's? A. No, I do not.

Q. It appears that subsidiaries of National license pictures for exhibition in their theatres from Warner's. Do you have any knowledge of the terms under which those pictures are licensed? A. I do not have.

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(1537)

Q. Likewise it appears that they negotiate and license pictures from RKO. Do you have any knowledge of the terms of those agreements? A. I do not have.

Q. Likewise it appears that those subsidiaries license and exhibit pictures of Paramount. Do you have any knowledge of the terms upon which those pictures are licensed? A. I do not have. However, it has been inferred to me that Paramount makes a different kind of deal than I make.

Q. In the course of the preparation for this performance, you have read Mr. Reagan's testimony? A. Yes, sir.

Q. When you negotiate a license of Fox pictures to Loew's, to the Loew's theatres, do you attempt to secure the same term as subsidiaries of Loew's pay Fox? A. I don't know what their terms are. How could I attempt? I attempt to sell my merchandise for the best price I think it is possible to get, not only with Loew, but with anybody else.

Q. It appears in evidence, Mr. Kupper, that you license the Fox pictures to Loew's for first-run exhibition in Worcester, and it appears in evidence that Loew's licenses to a subsidiary of National the Loew pictures for first-run exhibition in Milwaukee. Do you attempt to match those deals? A. No, sir. How can I match them, if I don't know what they are.

Q. Do you trade screen time in Milwaukee, which National gives Loew's, for screen time in Worcester, which Loew's gives you? A. No, sir.

Q. Is the length of time which a picture will play in a first-run theatre of Loew's in Worcester conditioned upon the length of time which National will play a Loew picture? A. Not to my knowledge.

Q. Have you ever conditioned it? A. I have never, no.

Q. Have you ever discussed the subject with any buyer of motion pictures for Loew? A. No, sir. In fact, I don't

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know how long many of Loew's pictures play, or any of them. I don't watch how they book their pictures. I only watch how we book ours and see that I get as much playing time as possible in all situations.

Q. It has been suggested here that there is an exchange of screen time between the defendants. Have you made any such exchange? A. Never.

Q. Have you ever made any attempt to secure from Loew's for exhibition of the Fox pictures, approximately the same number of dollars that National subsidiaries pay to Loew's for the exhibition of Loew pictures? A. No, sir, and again, I never knew what they do. I don't know the dollars. All I was concerned about was getting as much revenue for my pictures as those theatres could afford to pay.

Q. Turning to Warner Bros., it appears in evidence that (1539)

you license the first-run of your pictures for exhibition in Cleveland to Warner Bros., and it appears in evidence that a subsidiary of National licenses Warner Bros. pictures for exhibition in its theatres in San Francisco. Are those two deals traded off against each other? A. No, sir.

Q. Is the screen time which you will receive from Warner in Cleveland matched by the screen time which National will give Warners in San Francisco? A. No, sir.

Q. Warners have a picture, I think, called Christmas in Connecticut. Do you attempt to sell a picture like A Tree Grows in Brooklyn to Warners for the same dollars, same terms that National buys the picture from Warners? A. No, I do not. We sell our pictures to Warners, they are on percentage, and I don't know what dollars it is going to bring until the engagement is over, and I don't know how Warners sell their pictures to the other people.

Q. Do you match off top grossing pictures against top grossing pictures? A. No, sir.

Q. Do you say to Warners, "If you will buy A Tree Grows in Brooklyn at 40 per cent of the gross, National will buy a Bette Davis at 40 per cent of the gross"? A. No, sir.

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Q. Any such conversation occur? A. No.

Judge Hand: What is the use? This is nothing
(1540)

but reiteration of his generalizations.

Mr. Caskey: I think I can condense it then.

Q. If I ask you the same questions with regard to RKO and Paramount, would your answer be the same? A. It would.

Q. Now, Mr. Kupper, who negotiates license agreements on behalf of Twentieth Century-Fox? A. Well, our salesmen, our managers, ~~our sales managers~~, our district managers.

Q. General sales manager? A. General sales manager.

Q. Mr. Connors? A. Mr. Connors.

Q. Are the customers allocated among those various individuals? A. Well, I wouldn't say they are allocated. Each salesman—let us review it from the salesmen on—each salesman has a given geographical territory in his branch and he is responsible for the negotiation and sale of our product there. I would say this, that beyond that point we would try to have the salesman or the sales manager or the branch manager, who is best fitted and perhaps has the best standing or acquaintance with an individual account, to negotiate. He has the better prospect and probably could do better. He lives with the situation, probably more intimate.

Q. Is it your endeavor to have the particular sales representative, whatever his position in the hierarchy, deal with
(1541)

the exhibitor whom you think can accomplish the best results? A. That is the general rule.

Q. I wish you would turn to the weekly schedule of revenue. Have you got the one there for the week ended October 13th? A. No, not with me. I got one over there (indicating).

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Mr. Wright: Is this a proposed exhibit?

Mr. Caskey: No.

Q. During the week ended October 13th, what number of billings did you have in the aggregate on the 1945-46 product? A. 1,642.

Judge-Bright: What do you mean by billings?

The Witness: You want me to answer that?

Judge Bright: Yes.

The Witness: Well, a billing is made from a booking or a run that has played that picture during the week. In other words, on the first picture there, there were 293 runs that played the picture, and they were billed. The billings come through and they are tabulated by our tabulating department which gives us an analysis of where this revenue comes from.

Q. During the same week, how many billings were there on the 1944-1945 product? A. 4,547.

Q. How many during that same week on the 1943-1944 product? A. 492.

(1542)

Q. The aggregate of those three figures is the number of theatres in the United States that played a Twentieth Century-Fox picture during that week? A. May not be all. There may be some more, some prior products, which we could have in our branches, which accumulated and work out. We don't take every picture out of release until it is worn out.

Q. But at least that number of theatres played a Fox picture during the week? A. That is correct.

Q. Turn to the 1944-1945 sheet and take the pictures that have been in release for about twenty weeks, and give us the number of billings during the week? A. Well, that is one,

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22 weeks, say, a picture called Bullfighter; it is a comedy with Laurel and Hardy. 314 bookings.

Q. That means that 314 theatres played that picture during that week? A. That is what it means. The next one is 21 weeks, picture called Diamond Horseshoe, 402 bookings.

The next one is a picture called Where Do We Go From Here, 17 weeks in release, that particular week played 419 bookings.

Q. Turn to the 1945-1946 season. How long has A Bell for Adano been out? A. A Bell for Adano has been out for ten weeks. This is a little blurred, but I think it is ten weeks. It played during that week 293 bookings.

Another picture came out simultaneously with that (1543)

called Junior Miss, ten weeks of release, played 281 bookings.

Q. Just to emphasize it again, each one of these billings is the number of theatres in the country playing that picture during that week? A. That is right.

Q. Approximately what is the cost of a black and white print? A. You mean positive print?

Q. Positive print. A. Oh, around \$150, somewhere in that neighborhood. It depends a lot on the length of all pictures what the cost will be, but somewhere in that neighborhood.

Q. Are war restrictions off now on the number you can print? A. Yes.

Q. How many do you print of a top picture? A. Right now I believe we are printing close to 350, if not 350, but not of all pictures. That is top pictures.

Q. What did you get down to during the war? A. Well, I think 285.

Q. That was the maximum on any picture? A. Yes, sir.

Q. What is the cost of a sepia print? A. That costs more. You are talking about technicolor?

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Q. No, I am talking about brown. A. That costs more. I don't know the exact cost but it is a greater cost than the plain black and white.

Q. What is the cost of the Technicolor print? A. Well, (1544)

it runs, as I testified yesterday—a picture costs \$344 and some odd cents to as high as—depending on the length again—\$750, \$800.

Q. Technicolor prints are produced by a corporation in which Fox has no interest? A. That is right.

Q. The laboratory is in— A. In California.

Q. And it is operated by people with whom you have no interest? A. Yes, sir.

Q. How are the prints allocated among the country? A. You want me to give it to you by branch?

Q. Have you got that allocation there? A. Well, I have the approximate allocation in various degrees. I can give it to you roughly.

Q. Will you give us the allocation? A. Yes. I have here an allocation of when we had 329 prints, which were top subjects, making a few more now, we allocated originally for New York 22 prints; Philadelphia 14 prints; Pittsburgh 10 prints; Washington 9 prints; Albany 5 prints; Boston 14; Buffalo 6; New Haven 4; Atlanta 15; Charlotte 8; New Orleans 7; Dallas 14; Memphis 5; Oklahoma City 5; Chicago 11; Detroit 7; Milwaukee 6; Cincinnati 9; Cleveland 8; Indianapolis 7; Des Moines 6; Minneapolis 11; Omaha 5; Kansas City 10; St. Louis 10; Denver 6; Salt Lake 6; Los Angeles 14; Portland 4; San Francisco 10; Seattle 4. (1545)

Q. How do you determine what number to allocate to each exchange? A. Well, we know what the prospects are in each situation. We have had these exchanges in operation a long time. We know what contracts we have had in the past. And we figure out and know about how many book-

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ings a print can take, which generally averages I think with us around 45. That is not showings, that is bookings. Some bookings are a week, three days, two days, some two or three weeks, but we average them out as that many bookings. We also keep a number of prints as we call, in the home office in reserve, which we send around and use where they are needed in an emergency, or to start getting things rolling. For instance, New York, after you play your first-run, and then plays its run at the Albee Theatre, a great number of theatres then come in what we call New York City, then RKO theatres play simultaneously, so we have to have prints in reserve, so we call them in from branches to take care of those bookings in addition to the regular allotment of 22 that New York has. So let us assume they got all those 55 prints, or, approximately, say 40, if they only got 40, then they would be operating 62 or 65 prints, something like that at that particular time, and that would go on for a period of a few weeks. Of course, Brooklyn, the next place after New York plays, they start off the same way and so on. There (1546)

are other cities like that too. When the product comes after the first-run, that is, clearance for the subsequent runs following, there may be some cities that may have five or six houses that might play seven-day runs. They all have to be supplied. Well, that branch's particular allotment there may not be able to take care of it, because they may play pictures out in the country, in the country area, I mean important towns but they are in the country area, so we have to be able to draw on our supply and help them during those periods, and that goes on in many cities.

Q. How do you determine the number of prints that you will manufacture? A. Well, that is, as I say—years ago we did not make this many, but as our business grew and our product grew, and we have studied the situation, we have

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come to the conclusion that this is enough prints for us to handle our business, and I mean enough to be profitable to handle the business.

Q. I am reminded that when I asked you yesterday about the clearance which the Roxy Theatre took over metropolitan New York, I forgot to ask you whether on those pictures which you licensed the Music Hall, you granted the Music Hall the same clearance? A. I believe it is the same.

Q. Prior to the Consent Decree, did Fox license its pictures under franchises? A. We had some franchises, yes. (1547)

Q. What is a franchise? A. A franchise is a—after the negotiation is made, it is reduced to a franchise term and it is, for a period of more than one year—some franchises for two, three, five years, some higher, ten years. It is a contract for a period beyond one year.

Q. Are many franchises in existence today? A. No, sir.

Q. For Fox? A. No, sir, not today.

Q. It is in evidence that Fox made a franchise in 1932 with the operator of the Capitol Theatre in Washington at or about—I have forgotten. What were the circumstances of the making of that franchise, if you remember? A. Fox had that at one time, in fact they built it, or had it built, or leased it from some company, or an affiliate of theirs, and we were in difficulty, at least our company, our theatre company was in difficulty, and they decided to lease it to Loew. In fact they were very bad times and we weren't doing good, the company was in trouble, and I think we had a lot of money, perhaps, up on lease, as I have been told, probably a quarter of a million dollars, and a quarter of a million dollars in times when we were having trouble, in difficult times, was a lot of money to help pay the help, so they made a lease with the Loew people to take over and operate the theatre. They were—they got the theatre, let us put it that way, and in making that lease we worked out a franchise that our pictures would continue to play in that theatre.

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(1548)

Q. That franchise insured Fox that its better pictures would continue to play in that theatre? A. That is correct.

Q. It has been testified here that that is the best theatre in Washington. A. I think it is the largest and one of the best, if not the best.

Q. It is a very large, de luxe theatre? A. Yes.

Q. Did your company also make master agreements?
A. We have had some master agreements.

Q. What is a master agreement? A. Well, a master agreement is a written document of a lot of the negotiations that were made in a deal that were reduced to writing and became part of a contract—became a contract.

(1549)

Q. Was the uniform or standard printed contract made a part of those master agreements? A. I believe they were in all cases.

Judge Goddard: I don't quite understand what a master agreement is.

Q. Describe it, Mr. Kupper.

Judge Bright: When was the first one made?

Q. (Continuing) Give us some specific example.

The Witness: The first one I ever made, your Honor, was with the buyer or the agent for Warner Bros. Circuit, and that took in quite a number of theatres, we negotiated over quite a period of time, and it was their idea that we ought to have something more than just what we had on our printed form and have it all reduced, so it was understandable. I remember we argued over points sometimes weeks before it was reduced to writing, so there would be no misunderstanding. And that was the part of the whole

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contract. As I say, it was all written up. It was a deviation and they would not accept just the regular form, I suppose, and they wanted something different, but, by the same token we also included and had it as a part of this that wherever there is any difference, I suppose, the master agreement would prevail or be the thing that was worked from.

Judge Goddard: Was there a master agreement in all cases or only in exceptional cases?

(1550)

The Witness: No, they were exceptional cases.

Judge Goddard: What is the reason for a master agreement?

The Witness: I could never understand any reason for it. Some buyers for some theatres, particularly Warner—I remember the man, Lakinson. I think it was his brain child, some new idea that he wanted to be built up. That is the first I ever came in—

Q. It is an agreement relating to a number of theatres, is it not? A. That is correct.

Q. Where the exhibitor has a number of theatres? A. That is right.

Q. And where you agree upon certain uniform terms for each of those theatres? A. That is right.

Q. For example, you agreed that the cost of a double feature not to exceed some specific amount may be deducted before computing the percentage? A. Those matters were all in there, yes.

Q. Or that the exhibitor might preview the picture on Saturday nights? A. That is correct, and beyond that it was used—then we made a deal sheet of what we agreed to on each individual situation, and rather than go through all of that for each house and put it up on each individual separate blank form, it was decided to put all these forms

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(1551)

on these few, four or five, sheets of paper, whatever it was, that was to govern all of them. That is the principal thing beyond what the actual negotiated terms were for the picture in each house.

Q. Did you make those with independents? A. I think we did. I think we had a couple, but I am not positive. We had very few master agreements.

Q. Do you still make master agreements? A. No, I do not believe we do. In fact, I am sure we do not.

Q. Mr. Kupper, you have told us on several occasions about the New York situation. The Twentieth Century-Fox has an interest in Roxy Theatre? A. Yes, I understand they have a definite interest.

Q. And since 1937 you have licensed Fox pictures to it? A. That is right.

Q. What advantage has there come to Twentieth Century-Fox from exhibiting its pictures in the Roxy Theatre? A. Well, a great deal. It is a definite home for our pictures. It is our show window in this particular area and sometimes it reflects itself throughout the country, depending on when the picture plays.

Q. What picture are you currently playing? A. We are playing "The House on 92nd Street," in its fifth week. It terminates tonight, close of today's exhibition.

Q. Has that picture any nationally known stars in it? (1552)

A. No, sir, it has not.

Q. Is it a picture made from any— A. I would say there are names that are known nationally, but they aren't what you would term great box office stars.

Q. Betty Grable isn't in it? A. Oh, no.

Q. Is it made from any nationally known book or magazine article? A. No.

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Q. What will the benefit be to Twentieth Century-Fox from the exhibition of that picture for five weeks in Roxy's?

A. Well, first of all, I know it is definitely throwing off a terrific rental right from that theatre. Secondly, I know that the exploitation that was given it has gone clean around through this country. It has been surprising, the newspaper campaigns and the radio campaigns; and all the columnists have taken it up, they have studied it and have seen it. And it has sold that picture not only in New York but throughout the country not only to the exhibitors, but also to the public. They have heard of it, in other words.

Judge Bright: The appeal of that picture is not based on the stars that are in it?

The Witness: No, sir.

Judge Bright: Is it on the subject matter?

The Witness: On the story, yes, sir. It is intriguing and it holds you.

Judge Bright: That is about F. B. I. work?

(1553)

The Witness: It is a story about something—

Q. Is five weeks a long engagement in Roxy's? A. Yes, it is. Pictures don't all play five weeks there. Five weeks, I would say, is a good engagement at the Roxy, very good.

Q. In Kansas City, Missouri, where do the Twentieth Century-Fox pictures play first-run? A. Well, we play in two theatres day and date in Kansas City, Missouri, one theatre the Esquire, which is a downtown house, and it is a handbox type of house, it is a small theatre, but it is well appointed, and we also play at the Uptown Theatre, which is a fine theatre, but it is in more of a residential district, it is away from the downtown business area. That is a large theatre.

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Q. Simultaneously with those two theatres do you also play a third theatre? A. Yes, we do, but that is not in Kansas City. You asked me Kansas City, Missouri.

Q. Where is that located? A. It is right outside of Kansas City, across the border from Kansas City, out of the city environs.

Mr. Wright: May we have the name of that one?

The Witness: Fairview.

Q. Fairway, isn't it? A. Yes, Fairway.

Q. In the 14 cities other than Kansas City in which National has first-run theatres, and that is Spokane, Seattle, (1554)

Portland, San Francisco, Oakland, Sacramento, Los Angeles, Long Beach, San Diego, Wichita, Denver, Kansas City, Kansas, Milwaukee and Detroit, do you license Twentieth Century-Fox pictures first-run to the National Theatre subsidiary? A. We do.

Q. And is the theatre in each of those cities in which the Twentieth Century-Fox pictures play either the best theatre in the city or comparable to the best? A. I would say yes in all cases, possibly with the exception of Kansas City, which I explained to you a minute ago. Downtown Kansas City we haven't got as large a theatre but it is a well appointed house, but between the two, the combination, I mean, the simultaneous run and showing, we have good representation. However, I don't believe it could throw off as much money as Paramount Theatre downtown, as an example, not as much, but the combined thing is not as good, but we have a very satisfactory engagement, arrangement for our product in Kansas City, I believe.

(1555)

Q. Now, in the other 14 cities that I read off, what is the situation? A. Well, in my opinion they are as good if not

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better than any of the opposition. Certainly in most of them they are much larger.

Mr. Caskey: During the examination of Mr. Rodgers I had marked for identification and offered these beautiful photographs. They were objected to by Mr. Wright, and I have no desire to go contrary to your Honors' desires in the matter. We can illustrate the case by putting in pictures of the theatres in the 16 cities; but if Mr. Wright objects why, we will abide by the ruling.

Mr. Wright: It is just as objectionable now as they ever were.

Judge Hand: All right.

Mr. Caskey: I shall make the formal offer, and I shall ask the clerk to change the markings from F-A, F-B, F-C and F-3 to F-1, 2, 3 and 4 for identification.

(Markings changed as indicated.)

Q. Now, Mr. Kupper, whom do you license first-run in Boston? A. We split our product in Boston. We license two-thirds to what is known as the M. & P. Circuit, which is an affiliate of Paramount, and one-third to RKO's theatres.

Q. What is the character of the Metropolitan theatre? (1556)

A. Oh, it is a very beautiful, large theatre, well appointed. It is a palace, you might say, one of the best in the country.

Q. Of the pictures which you license to M. & P., are the best pictures played in the Metropolitan? A. Yes, sir.

Q. And from the Metropolitan are they moved over? A. They are moved over to the Paramount and Fenway; and also the Paramount and Fenway play some first-runs that are perhaps not suitable for the Metropolitan.

Q. Where is the Fenway? A. The Fenway is in Boston; not downtown. It is outside, the suburban area.

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Q. One-third of your product you license to RKO? A. Yes.

Q. What theatres do they have? A. They have two theatres. They have the Memorial and the Boston Theatre. They are both large theatres. The Boston Theatre plays stage attractions a lot, but the Memorial Theatre is an out-and-out picture theatre, and we play there the better pictures that are on the license agreement.

Q. The Memorial is a memorial that the bondholders erected to Mr. Keith? A. I understood so.

Q. Where did you play the picture "Song of Bernadette"? A. In Boston we played "Song of Bernadette" in the Majestic Theatre which is now being operated by Mr. Harry Brandt, an independent; and I think we negotiated directly—I am sure we did—with the Shubert Enterprises who own (1557)

the theatre. We sort of leased the theatre, you might say.

Q. And showed the picture yourself? A. Yes, sir.

Q. How long did it run? A. 26 weeks.

Judge Bright: That was what you call a road show?

The Witness: That was on a road show basis, yes, sir. We were licensing the picture on a road show basis; that means an advanced admission over and above the general run.

Mr. Caskey: If your Honors please, I want to interpolate there; I do not think it is a matter of controversy. Until quite recently road show also connoted reserved seats or a restricted number of engagements; that is, one in the afternoon or one at night. Now, I think that since "Gone With The Wind" these pictures which have been exhibited at advanced admission prices have not had reserved seats, and they have usually been a continuous operation. I think that

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has been the cause for some of the hesitancy in the definition.

Q. The "Song of Bernadette" showed at advanced admission prices, did it not? A. It did.

Judge Bright: Most of those pictures shown as road shows take up a whole session, don't they? They are longer than the average feature?

(1558)

Q. How long was "Song of Bernadette", Mr. Kupper?

A. I do not recall the exact time. It was a long feature; more than the general.

Q. It was about 150 minutes, wasn't it? A. Something like that; close to two hours.

Q. How long was "Wilson"? A. That was over two hours.

Q. And that also was shown at an advanced admission?

A. Yes.

Q. But it was shown on a continuous operating policy?

A. Yes, sir, it was.

Q. No reserved seats? A. I don't recall any theatre having reserved seats, a reserved seat section where they played the picture.

Mr. Caskey: At page 26 of the Appendix C, in answer to Judge Bright's questions, a footnote to Section 14 of the consent decree, which is printed at page 26 of Appendix C, reads: "Road show is an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at admission price of not less than one dollar."

Now, within the meaning of that definition neither the engagement of "Wilson" or "Song of Bernadette" was a road show.

Mr. Wright: Why can't we have the witness say what a road show is now?

Colloquy

(1559)

Mr. Caskey: He said so.

Judge Bright: I think he has defined it, hasn't he? It is a picture showing at an advanced price over ordinary admission.

The Witness: Well, it is a considerable advance over the ordinary admission price. I say that, your Honor, because very often we would have a contract, let us say, for 50 cents admission, but the exhibitor may charge 5 or 10 cents more; like we had some pictures, Rosie O'Grady, I know it played for more than what was stipulated in our license agreement. Well, that would not be construed as a road show; but that is an advance of the regular admission to the theatre. But generally, what he was talking about, the Song of Bernadette and Wilson, where we sold it, I would construe that as what we term road show engagements. We only showed to around 3000, I think, the first time with Song of Bernadette, at that advanced admission, \$1.10; and Wilson I think we played to a little better than that; we played to around 4000; whereas a general run of the picture would go into 15,000. By that I do not mean we are not going to play to 15,000 or 16,000 on Bernadette and Wilson. We are going to do that on a second time around at the regular admission. In fact, we are well on our way with both of them with that accomplishment.

(1560)

Judge Hand: Mr. Caskey, what is the point of all this?

Mr. Caskey: On the admission price?

Judge Hand: Well, all this talk about road shows which is defined here in the consent decree. I do not know that the witness is so clear about it. I sometimes wonder who gets up these terms, because they

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do not seem to be even understood by highly experienced men in the business.

Mr. Caskey: Oh, I am sure we attribute this definition to Mr. Wright.

Mr. Wright: I am equally sure that this definition that is in the decree has absolutely no relevance to the way they treat a road show now, and that they have changed the term to suit their own convenience.

Judge Hand: Well, equally it has no relevance to the case.

Mr. Wright: Only this, if the Court please: I think it is important to get it straight, because what it actually is, is simply another device for exhausting revenue from the picture before you put it into general release. What happens is that after the road show it does not become available to subsequent-run houses. They have a road show, and then they have the first-run, and then a kind of regular release.

Judge Hand: It would seem to me to be a shifting

(1561)

thing that nobody could define in any firm way that could be a continuous enduring definition.

Mr. Wright: I think it can be defined, but I will reserve that for cross-examination.

By Mr. Caskey:

Q. Well, in licensing the Metropolitan and Paramount and Fenway theatres in Boston, with whom do you deal? A. Mr. Marty Mullins, and he has an associate that handles his booking and buying department named Stoddard.

Q. And in licensing the pictures to Boston and Keith's Memorial with whom do you deal? A. We deal with Mr. Harold Mirisch.

Q. Now, Cambridge is a suburb of Boston? A. Yes, sir.

Q. And to whom do you license your pictures first-run in Cambridge? A. M. & P. Circuit.

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Q. And do you know what theatre that is? A. Well—

Q. You can refer to your notes. A. Can I refer to them?

Q. Yes. A. I didn't know I could.

Q. Page 19. A. What page?

Q. 19. A. I will tell you quick (examining). Central Square Theatre in Cambridge.

Mr. Wright: If he has got his testimony written out, why can't we just have it read in?

(1562)

Mr. Caskey: What I would like to do, Mr. Wright, is to hand you a copy of the notes; and I shall bring out the highlights, which I must insist upon doing; and then I shall offer the remainder and let you cross-examine on the total.

Mr. Wright: An excellent idea.

Q. In Somerville whom do you license first-run? A. M. & P. Theatres.

Q. How long have they had those theatres? A. I do not think they have had them so long. I think there was an independent man at one time, and they leased it from him; I am not sure.

Q. And prior to the leasing of the theatre to M. & P., you licensed the same theatres for the same run? A. Yes.

Q. Was there any change in the run after M. & P. negotiated for it? A. No, sir.

Q. Where is Somerville? A. It is a suburb of the City of Boston. It follows Cambridge, I believe. Cambridge follows Boston first-run.

Q. And whom do you license in Lowell? A. Well, there are three theatres in Lowell. We license M. & P.

Q. Now, in Cambridge and Somerville and Lowell with whom do you deal in negotiating the license agreement? A. Mr. Mullins and Mr. Stoddard. We do it in Boston, at their office or our office.

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(1563)

Q. Where are the payments for film rental made? A. To our Boston office from their office.

Q. And these four situations, Boston, Cambridge, Somerville and Lowell, are the only theatres among the 92 that are operated by Mullins & Pinanski, are they not? A. I think so, yes, sir. Of the 92 cities?

Q. Of the 92 cities, yes, sir. Lowell plays after Boston also, does it not? A. Yes, sir.

Q. Now, in Fall River, Massachusetts, whom do you license first-run? A. Mr. Nathaniel Yamins, who is an independent operator. He has been there for a great many years.

Q. Has he all the first-run theatres in Fall River? A. Yes, he has three, I believe.

Q. Are there subsequent-run theatres in Fall River? A. No, I do not believe there are. I think he has all the theatres.

Q. In New Bedford, Massachusetts, whom do you license first-run? A. A man named Zeitz. He has been our account. He has three theatres, one very good one, one not so good as the first one, and another, smaller house; but he has been an account of ours since the first time I went to Boston; I met him some 20 years ago; he was an account then and still it.

Q. Is there an M. & P.-operated theatre in New Bedford? (1564)

A. Yes, sir.

Q. Do you license it? A. No, sir, we do not.

Q. In Providence, Rhode Island, whom do you license?

A. We license our product to a man named Edward Fay. He is an independent operator. He has the Majestic Theatre, which is his best theatre, and in which we play all our important pictures; and he has another house which we moved over to. He has been an account of ours for more than 20 years too, incidentally.

Q. What is the name of that move-over house? A. I am trying to think of it.

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Q. It was named for him, wasn't it? A. Fay's Theatre, that is it.

Q. What other first-run theatres are there in Providence?
A. I know Loew's have a theatre up there; I believe Warner's have a theatre, or some other defendant here has a theatre.

Q. Do you license them? A. No, we do not. We license Mr. Fay.

Q. Whom do you license in Albany? A. I think I testified to that yesterday. We license our product to Mr. Fabian, and also to the Warner Bros. Mr. Fabian, I think has two-thirds and Warner's has one-third. That was the result of a historical background which I gave yesterday, from the Clinton Square to the Leland to the Fabian.

(1565)

Q. And as to the pictures that Fabian plays, with whom do you negotiate? A. We negotiate with Mr. Fabian. They have an office here in New York, and they have an office up in Albany too; but I think it is all done in New York.

Q. Mr. Fabian has his own office here? A. Yes.

Q. From which he negotiates license agreements? A. Yes.

Mr. Wright: Excuse me. On a situation like Albany, it is going to be the testimony rather than what is on here, is that right? You are not offering these printed sheets where you take him over it, or is he supposed to supplement that?

Mr. Caskey: This is the full text.

Mr. Wright: I see; but all you propose to put in the record—

Mr. Caskey: No, I am going to offer the full text too.

Mr. Wright: That goes in in addition?

Mr. Caskey: Yes, sir.

Q. Now, in Utica whom do you license first-run?

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Judge Hand: That seems pretty odd. What do you do that for?

Mr. Caskey: Well, in order to save your Honors' time. There is a certain amount of background material which we think important to have in the record in view of the charge of combination, but the relating of which is not particularly interesting. We can go through it in detail, but I had hoped to shorten the Court's time some.

(1566)
Q. Utica? A. At the present time we sell our product to Mr. Gordon who operates the Olympic Theatre. He is an independent exhibitor. Prior to that, years ago, we sold Mr. Nate Robbins. We had two theatres up there, and he was an independent exhibitor. And he sold to Warner's. And we sold Warner's subsequent to that for quite a while until—well, we had a disagreement; we couldn't get together as to terms; and we went out and solicited and worked up Mr. Gordon as an account. I think we gave him a franchise for a period of years, and he has had our product ever since.

Q. He has had the product for at least 12 years? A. Yes, at least that.

Q. And he plays all the Fox product first-run in Utica?
A. That is right.

Q. Now, in Syracuse whom do you license first-run? A. Well, today it is the RKO people. That is licensed through the RKO booking office here in New York. Mr. Mirisch handles that. That is, he is the one we negotiate with. That started a long time ago. Schine was in there a long time ago, and we served him; and he, in turn, I think sold to Warner's, and they dropped the house, and somebody else got it back; but in the course of history it is the same houses we originally started with.

(1567)

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Q. Do you sell to Loew's in Syracuse? A. No, we do not, nor Warner's.

Q. Now, in Rochester whom do you license first-run? A. In Rochester it is RKO again; but here, is a case where Comerford was there for many years; he was an independent operator; and he later became some sort of affiliate, or Paramount bought some interest in their circuit; but, anyway, they operated independently until they made some sort of an arrangement with RKO, but it is the same houses we originally sold our product to when we sold Comerford.

Q. Do you sell any theatres of Loew's in Rochester? A. No, we do not, though they are in opposition.

Q. In Buffalo whom do you sell first-run? A. Well, for years—right now we sell the Loew organization. They operate first-run theatres which we license. That is another case. For years we never had a very satisfactory outlet, and a man named Shea—it is not the same Shea we have been referring to in Pittsburgh; it is another man, Mike Shea, who was there for years, and he had some theatres, and Fox finally built a big theatre in there. Though he never operated it, he (1568)

built the theatre; and I think we had Comerford take it over from the day it was completed until it was subsequently sold, or arranged a pool, and taken over by Loew; and we kept our product there ever since.

Q. The theatre that Mr. Fox built, or one of his companies, was the Great Lakes? A. Yes. In fact, they have got three big theatres up there. They have got the Buffalo, the Great Lakes and the Hippodrome, which is used for move-over and first-run, but the better pictures go into the Great Lakes and the Buffalo.

(1569)

Q. And is the Great Lakes comparable to the Buffalo? A. Yes, sir.

Q. Now, in addition to that, in Buffalo Basil Bros. operate there, do they not? A. Yes. They have a theatre—they

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have two theatres there. A man named Yellen also operates a theatre. One is the Lafayette and the other is—oh, I can't think of it right now.

Q. The 20th Century? A. Yes, the 20th Century. And we serve Yellen. As matter of fact, we licensed Yellen the picture Wilson there.

Q. Now in Worcester, Massachusetts. A. In Worcester, Massachusetts, for years and years we sold Mr. Poli, who is an independent operator all over the State of Connecticut, and Massachusetts too. He is quite an independent, very aggressive, a very up-to-the minute exhibitor. He built a lot of fine theatres there. We sold Mr. Poli. And then Fox bought those theatres. That is my understanding, my belief, anyway. And, in turn, Loew got the theatres, or we lost them. Poli got them back, and then I think Poli made a deal with Loew; but we have always played in that theatre. We played it before we were associated with it.

Then there is opposition there. Hoffman, incidentally, is opposition, too, a lot of these towns; he was an independent exhibitor; and he sold to Warner Bros. He sold his theatres (1570)

to Warner Bros. But we don't sell Warners in this situation. We sell the Loew people, and we do the negotiations with Mr. Vogel in his office here in New York.

Q. And the Fox Company which purchased these theatres from Mr. Poli was Fox Theatres Corporation, was it not?

A. Yes, that is right. I believe that was the corporate name.

Q. It is not the present defendant? A. No, sir.

Q. It is a company that went into equity receivership in 1932. Do you know that, Mr. Kupper? A. I understand that is right.

Q. Now, the same situation as to Worcester applies in Springfield, Massachusetts, Hartford— A. No, there is a little difference in Springfield. Years ago we had a theatre in Springfield and we did not have one in Worcester. It

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was called the Fox-Nelson Theatre. Fox operated it a long time. It is not as good a house as Mr. Poli finally built in there and which eventually Fox bought. So after we bought the Poli theatre, we naturally would transfer our product to the Poli theatre; and it is now in the Loew's organization. But we played our pictures there for a great many years. We sell Loew in the situation.

Q. In Springfield? A. Yes.

(1571)

Q. And do you sell Loew in Hartford? A. Yes.

Q. And in New Haven? A. Yes, the same situation, the same story in Hartford and New Haven. We never had theatres there, but they were Poli, and then became Fox and then became Loew's. And again, I must say we played them before we ever had any interest in those theatres; and they are all fine theatres, all big theatres. Poli never built anything but good, fine, big theatres, to my knowledge.

Q. The same in Bridgeport? A. Yes; and in a number of these situations Warner is opposition, which I stated before, which we do not sell.

Q. So that is five of the cities where today you license to Loew's, the theaters are a part of the Poli Circuit? A. Yes.

Q. That is out of the nine cities having a population of 25,000 and more which you license, five of the cities are Poli towns? A. That is right.

Q. Now, whom do you license in Yonkers? A. At the present time RKO. There is also another interesting history to that town. We sold to two theatres which were independently operated. They were the Strand and the Hamilton theatres. I can't recall the man's name. It is probably on here—oh, yes, his name was Hamilton, and he, in turn, sold the theatres to a man named Walsh; and Walsh, incidentally, (1572)

happened to be the mayor at one time of Yonkers, or the mayor at the time he bought them; and we continued to

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supply our product there; and then RKO made a deal and took the theatres from Walsh; and we have continued to supply our pictures there. Loew is in opposition to us there, but we never sold Loew.

Q. In any of these situations where the theatre was operated by an independent and subsequently transferred to one of these defendants, did Twentieth Century-Fox have anything to do with the sale? A. Not to my knowledge.

Q. Now, in Newark, whom do we serve first-run? A. Let us see. We serve RKO today and Skouras Theatres. Originally we had a theatre there, too, the Terminal Theatre; and—I don't know what the year was, in the 1930s somewhere—a lease was made, or a deal was made with Skouras; he took them from the Fox Metropolitan Theatres—he took the Terminal Theatre, and he worked out some sort of a deal with RKO or Proctor Theatres that was operating, and our franchise gave him our pictures for the Terminal; but this Proctor's was a better theatre; and after he made his negotiations we were able to move our better pictures into the Proctor's, and finally all of them, because the Terminal closed.

Now, Loew is also in that situation, and we don't sell them. Paramount and Warners, too.

(1573)

Q. Our customer has been the Terminal Theatre? A. Originally, yes.

Q. And that is the theatre in which Mr. William Fox has had an interest for many, many years? A. Yes. I think before he had a Fox Film Company he had a vaudeville circuit of theatres, and that was one of them.

Q. In Jersey City whom do you license first-run? A. The Skouras Theatres. That is George Skouras operation.

Q. Do some of the pictures play in the Stanley Theatre? A. Yes. I believe Skouras did make a deal there also with the Stanley Company so that they had a theatre whereby

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they could put our better pictures in there, too, but originally it was with the Skouras Theatre, and he had a franchise for a number of years after he took the theatres over.

Q. In fact, that franchise is still in existence? A. Yes. I believe he has got seven or eight more years to go. Warner is in that situation and Loew's, too, but we don't license our products to them.

Q. Now, in Paterson, New Jersey, whom do you license?

A. Well, three theatres, the Fabian, the Rivoli and the Garden. Those theatres were built and operated by Mr. Fabian, but it is the same family Fabian that we have been talking about here, but this was his father that originally built these theatres, and we sold him. Later on he sold them to—
(1574)

I guess the Stanley Company, or, at least, Warner Bros. finally got them; but we have been selling those theatres right along.

Q. That is, those theatres were built by Mr. Fabian, Senior? A. Yes.

Q. And the Fabian is named after him, and not after Si Fabian? A. That is right.

Q. And he sold the theatres to the Stanley Company?

A. Well, I am not sure whether he sold them to Stanley, but I think they sold their theatres to Stanley, and then, in turn, Stanley sold to Warners'; but it is that period when they were out buying theatres and acquiring theatres. There is opposition in here, incidentally. Adam Adams has got a theatre there, in which Paramount has an interest; but we sell what is known as the Fabian theatres. We sell Warners.

Q. And we sold those Fabian theatres for a long time before Warners had any interest in them? A. Yes.

Q. Now, in Elizabeth, New Jersey, whom do you sell first-run? A. The Skouras Theatres, and they have an arrangement also, I think, with the Stanley Company. He

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made an arrangement with the Stanley Company that we put our better product in the better theatre there. Originally it was a Fox theatre all the time, something like the Newark situation, it went way back in the history of our company.

(1575)

Q. And has it been of advantage to Twentieth Century-Fox, to Jersey City, Newark and Elizabeth, to have the pictures played in those theatres? A. Certainly. They were better pictures.

Q. Produced greater revenue? A. Produced greater revenue.

Q. Now, whom do you license in Trenton, New Jersey? A. Well, we have a split on the product there at present. There is a man named Hildinger who has got a theatre, and we also have RKO as a customer down there. Before RKO got in there there were two independent theatres, two independent people, exhibitors. One was named Hershfield and the other was Hildinger, and they had three theatres, I think, between them. The best theatre was the Lincoln Theatre; and there was the Stacy, and another house I don't recall. Anyhow, they had these three theatres. The State was the third theatre. And the better product of ours back in those days played in the Lincoln Theatre, and the other product, the Stacy and the State. Well, Hershfield died, and Hildinger took over the whole operation himself, and he, in turn, made some sort of arrangement and sold—let us say sold the Lincoln Theatre to RKO. Well, we, in turn, sold the product—we licensed the product that we were accustomed to license in the theatre to the RKO house. So we have got a split in the situation; but they are still the same theatres that we dealt with.

(1576)

Q. And the independent that is left still has the pictures which he originally had in his theatre? A. Yes. He has what we consider his share of them.

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Judge Goddard: They are first-runs, too?

The Witness: Yes, they are all first-runs.

Q. Do you know how that split is made? A. Well, they generally make them themselves, these exhibitors. They know what pictures we have, the pictures they are going to license, and one of them makes the split-up one time, and he offers it to the other one to select from; and the next time it comes around, he lets the other fellow make the selection and he gives the opposite man the first choice. It is a more satisfactory way and easier way. They try to be pretty fair about it, pretty honest.

Q. Now, in Camden, New Jersey, whom do you license first-run? A. We license Mr. Varbalow; he has got the Savar Theatre. He has been our account there for quite a while; but prior to that we sold the Stanley Company in Camden, and the Stanley Company sold their theatres to Warners some years ago. I think it was in 1933. We could not have a meeting of the minds with the Warner buyers—I know about this, because I was in on the negotiations, definitely; we could not get together with Warners, not (1577)

only here but a lot of places—and we went to Mr. Varbalow. He had this Tower Theatre, a theatre that was not in downtown Camden; and we licensed our product to him and gave him a franchise; and when we gave him the franchise we had an understanding with him that he would build a downtown theatre, which he did; and we licensed our product there, and have continued to license it to this day.

Q. And he did build a new theatre? A. He did build a new theatre. That is the Savar.

Q. How does it compare with the other theatres in Camden? A. It is a very fine theatre. I think it compares equally with any of them.

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Q. In Philadelphia whom do you license first-run? A. Well, right to this minute it is now National Theatres. We had licensed the Fox Theatre there which Mr. Fox built years ago. Prior to that time we shopped around, I guess you would say, from pillar to post. We never could get a satisfactory first-run there, and I know when I was in New York in the early days with the company we tried to work out some arrangements with the Stanley people to take the theatre over, so he could license and show his pictures in there, but it never worked out, and I think Fox decided to build a theatre, and he built a big theatre in Philadelphia and operated it. I guess the Fox Theatre Company operated (1578).

it. That went on for quite a period of time. We licensed our pictures there. And they got in trouble; they got in difficulty, and the house was then leased, I believe, to Warner Bros. And with this lease, however, we protected ourselves that our product would play there in that theatre; and we also played in other theatres of Warners, equally as good as Fox's depending on which picture was suitable to which house; but our product played there continuously; and, as I say, it is only recently that the theatre is back in our hands; and we play our pictures there. We did play four or five pictures last year in the Karlton Theatre despite the fact that we have a license with the other theatre.

Q. Who operates the Karlton Theatre? A. That is an independent operation. Goldman, I believe.

Q. Now, in Scranton, Pennsylvania, whom do we license? A. As long as I can remember, in Scranton we licensed the Comerford Theatres. They have been there a great many years. In fact, they are the only theatres there, I think, and we licensed to John Nolan. He is their buyer.

Q. John Nolan used to be a Fox employee? A. Yes, he worked for us a long time ago. He was a branch manager for us in Buffalo. We had him in New York for a while, as a

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special representative, and then we sent him to Australia, but he got sick out there, and when he came back he took a long (1579)

time to recover, and he did not come back. He went with the Comerford Circuit.

Q. Those pictures were licensed to Comerford before Paramount had any interest in them? A. Yes.

Q. Now, in Reading, Pennsylvania, whom do you license? A. Well, we licensed Wilmer & Vincent, who was an independent operation. At one time we split our product there, when we had a lot of pictures, sixty-odd. We sold part to Wilmer & Vincent and part to Warners, and now we sell them all to Wilmer & Vincent. That came a little later on, when we had a little friction there which I was telling you about; we could not have a meeting of the minds; but today we sell all our product there. We also have sold some pictures to the Astor, which is an independent operation; but we sell them to Wilmer & Vincent who is in opposition to both Loew's and Warner and another independent. (1580)

Q. Is Wilmer & Vincent's Embassy the best theatre in town? A. I would think so. I would say 24 or 25 hundred seats. And the other theatres are pretty good size theatres too.

Q. Is it as good a theatre as the Loew's Theatre? A. Well, I would say so.

Q. And Wilmer & Vincent is or was an independent circuit? A. Always has been to my knowledge.

Q. Did one of them die recently? A. Yes, a few years ago. Walter Vincent is still alive. Wilmer died. I knew him pretty well.

Q. And according to trade repute they have sold out some interest— A. Just recently to Fabian.

Q. Do you know the details? A. No, I do not.

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Q. Now, in Pittsburgh whom do you license first-run?

A. Well, we have our product licensed to two independent accounts. The Shea interests have the Fulton Theatre, one theatre, and they get one-third of our product; and John Harris, who operates two theatres, the J. P. Harris Theatre, and another house called the Senator. Harris is the better of the two, and he plays our product. They both play our product on an extended run basis. The Senator is used as a move-over and also for the lesser product that we might supply them with or license them. There is a long history to (1581)

that though. Am I supposed to recite it?

Q. I think we need not go into it. Now, this Shea, just again for the sake of the record, is no relation to the Shea in Buffalo? A. Not to my knowledge. This is a different Shea, Mort Shea.

Q. Mort Shea? A. Yes. He is dead too, incidentally. The circuit is operated by Grainger, Edward Grainger.

Q. And Edward Grainger at one time was eastern sales manager of Fox? A. Yes.

Q. And his brother was the general sales manager? A. Yes.

Q. The Fulton Theatre is, no move-over theatre? A. No, it is not, but they play extended engagements, usually three or four or five or six weeks. They play them as long as the picture shows good strength.

Q. And J. P. Harris is likewise an independent? A. Yes.

Q. Now, in Erie, Pennsylvania, whom do you license? A. Well, we sell the Shea theatres. That is the same Shea we are talking about who has the Fulton Theatre in Pittsburgh. They are in opposition to Warner's out there. We have sold these theatres for a great many years. He is an independent. I know that definitely because I looked it up. (1582)

Q. In Pittsburgh Warner's and Loew's both have theatres? A. In Pittsburgh?

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Q. Yes. A. Yes.

Q. Now, down in Wilmington, Delaware, whom do you license first-run? A. We license the Rialto Theatre. A fellow named Belair has that theatre. Prior to that we used to sell the Stanley Company down there. They are all better theatres, incidentally, down there. Then when Warner got them, why, the time I am talking about when we had difficulty, we went to John Harris who had a theatre there, the same Harris who has got the Harris in Pittsburgh; and then he sold to Warner's; and we continued supplying Warner's—that is, the house that Harris had, which was formerly the Stanley house—until the time we had another disagreement and could not get together and could not have a meeting of the minds on the price; and we went out and solicited and worked up this account, the Rialto Theatre, run by Mr. Belair, and he plays our product exclusively in the town. We get long runs there. There is no question in my mind but that the Warner house there could throw off greater revenue, but we so elect to continue doing business with Mr. Belair.

Q. Mr. Belair plays Twentieth Century-Fox product almost exclusively? A. Yes. We license him all our product. I do not know of any other product that he has. I would (1583)
say that we consume all of his playing time.

Q. Now, that theatre takes clearance, I understand, over the whole State of Delaware. Do you know whether that is true or not? A. It would not surprise me. It is an important outlet, an important theatre, the same as the other companies do, I suppose, with their theatres for the same protection. I know what they do—Belair told me that—I would grant Belair that.

Q. As a matter of fact, there was an arbitration about that, wasn't there? A. Yes, I believe so, now that you call it to my attention.

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Q. Now, in Baltimore who do you serve first-run? A. We serve the New Theatre; we license our product to them. It has been our account for a great many years. I remember when the theatre was operated by Charlie Whitehurst.

Q. How old is the New Theatre? A. The New Theatre, to my knowledge, is 25 years old or more.

Q. Where is it located? A. It is located on the main street in Baltimore, a very fine location. It is not the best house by any means, but it is a good house for our product; we have got Loew there as opposition, and we have got two independents there as opposition too; but we have done business in this house for a great many years. Morris Mechanic is the owner and operator of it.

(1584)

Q. And he plays all Fox product? A. Well, he has been playing it all. Sometimes he can't absorb it all, but he has been playing—we consider him our first-run account there. Right now we are playing a picture with Loew because Mechanic is closing his theatre after our engagement of State Fair, which I think is in its fourth or fifth week by now, and rather than let our product back up, we made an arrangement with Loew's to play a few pictures which we are licensing now, and Mechanic is going to remodel his theatre. In fact, he told me he is going to put a considerable amount of money into it, because it has not been remodeled for a great number of years. He expects to make it the finest house in Baltimore.

Q. A quarter of a million dollars? A. That is what he told me.

Q. And he is independent? A. Yes.

Q. Of everybody? A. Yes.

Q. Now, in Baltimore there are very fine neighborhood second-run houses, are there not? A. Oh yes.

Q. And who are they operated by? A. There is the Durkee Circuit and some others.

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Q. And, at least, the Ambassador Theatre and the Senator Theatre which Mr. Durkee has are two of the finest neighborhood houses in the country? A. I would think so. (1585)

Q. Do you grant Mechanic clearance? A. We do.

Q. Over the Durkee Circuit? A. Yes.

Q. And, in turn, do you grant the theatres that you sell Durkee, license Durkee, clearance over other theatres in Baltimore? A. Yes, sir.

Q. Is Durkee an independent? A. Yes, sir.

Q. Now, in Washington I think you adverted to the fact that you license most of your product to what theatre? A. The Capitol and the Palace, right today operated by Loew's. Our better pictures will go into the Palace Theatre, and the Capitol today has an operation policy of some stage shows; and though we play important pictures in there, they only have the two houses, and you have to split your time up a little bit between both of them. At least we have two between both of them. As I say, we try to play our most important pictures in the Palace, and the others in the Capitol. That is where we play our pictures. The Capitol, of course, is the house that Fox had.

Q. That is in the National Press Club Building? A. Yes, sir.

Q. In Richmond, Virginia, whom do you license first-run? A. A man named Thalheimer. He has got a few theatres, and a few subsequent-run theatres too. Before he had these houses there was a man named Colter—Colter and (1586)

Mrs. Thorpe owned the Bluebird Theatre. Thalheimer is a real estate man or a lawyer, or something—

Q. There is quite a difference. Which is it? A. Well, real estate. Anyway, he acquired this Bluebird from Colter & Thorpe, and that started him in the picture business; and then he has got some other theatres; the Byrd Theatre is

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one of them; and we have supplied him right along. There was opposition right along even when we were selling the Bluebird. I think Wilmer & Vincent were in there. They took the theatre over from Wells, a fellow named Jake Wells, which was operated a long time ago by Harry Burnstein. Loew had a theatre there too. But ours is a very good outlet and is an independent account, and we do not sell Loew.

Q. Norfolk, Virginia. A. In Norfolk, Virginia, we sell the Granby Theatre. We have sold the Granby Theatre a long time. It is now operated by the Fabian, who just took it over from Wilmer & Vincent; but that has a history that dates back a long time. But we could not sell Wells, who later became Wilmer & Vincent; I sold his brother, who was Otto Wells; I sold him in Norfolk, Virginia, for a great many years; they, in turn, sold to Wilmer & Vincent; but it is the same house we had done business with. And then there is Loew's and there is an independent named Wilder, which we do not sell him.

(1587)

Q. Wilder has two or three theatres? A. Yes. And we do not sell him. At least, we don't sell him first-run.

Q. Now, in Charlotte, North Carolina, whom do you license first-run? A. We license the Kincey Circuit of theatres. They have three or four first-run theatres. When I first opened the Charlotte office for Fox they were there. It was not exactly Kincey in those days, but it was an affiliate down there, the Southern Enterprises, S. A. Lynch & Company, and they had opposition. We supplied our product around between them, and also a man named Craver had the Broadway Theatre, and it gradually became—both of them became the Kincey theatres, which is still the same theatres we licensed back in the early 1920's.

Q. With whom do you negotiate in licensing? A. That is done in Charlotte with Mike Kincey.

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Q. Where are the license fees paid? A. In Charlotte.

Q. And that is the only theatre in these 92 that you negotiate with Mr. Kinney? A. In these 92 cities.

Q. Yes. Now, in Atlanta, Georgia, whom do you license first-run? A. Well, we sell Lucas and Jenkins who operate the Fox Theatre and the Paramount Theatre and the Roxy Theatre and the Capitol Theatre. They have opposition there. Loew's have a theatre there, the Grand. Years ago we never were so happy with our outlet in Atlanta. That is, we could not get along so well with Lynch, and we had to (1588)

shop around and do the best we could until Fox finally built a big theatre there, the largest theatre in Atlanta, one of the largest in the whole south, the Southeast; and as I say, they got in difficulty and lost the house, and I guess Paramount wanted to have it; and Lucas and Jenkins have it; they are affiliated with Paramount—they are not affiliated—they operate for Paramount, but I always consider them an affiliate. But you might say our pictures went to the Fox when Lucas and Jenkins got it, and they are still there. I do not think we ever sold Loew a picture.

Q. And despite any protest by Mr. Rodgers, the Fox is the best theatre in Atlanta? A. Yes, in my opinion, yes.

Q. Whom do you negotiate with in licensing these pictures in Atlanta? A. Bill Jenkins. He has some other buyers, but Bill Jenkins is the man we do business with.

Q. Colonel Lucas is dead? A. Yes; he died a few years ago.

Q. And is Atlanta the only city among the 92 concerning which you negotiate with Mr. Jenkins? A. Yes, sir.

Q. Now, I want to take the three cities of Jacksonville, Tampa—the two cities of Jacksonville and Tampa. Whom do you license there? A. We license—I think it is called the Florida Theatres Company. It is an affiliate of Paramount, and we licensed those theatres long before Paramount was

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(1589)

affiliated. They were operated and owned by Sparks, the same theatres. It was an independent account. He later sold some interest to Paramount, and it was operated by Frank Rogers. He was an old friend of mine. He was a salesman who grew up with Sparks. But they were always Sparks with me. And talking about this thing, I never considered him as Paramount, although they are affiliated, they were Sparks' theatres to me, as long as I can recall.

Q. And Frank Rogers? A. He is the general manager and his office is in Jacksonville, and we do our business with him down there.

Q. Now, in Miami whom do you negotiate with? A. We sell our pictures to an independent account, Wolfson and Meyer, Wometco Theatres. Here is another situation that goes back a long time where we never could get a satisfactory run there; I think it was Lynch again who had those theatres, the first-run outlet there, and Sidney Meyer went down there and opened up a theatre, the Capitol Theatre, and we supported him ever since. In fact, we gave him a franchise and encouraged him down there, so today he has got quite a few theatres. Meyers at one time worked for us as a branch manager, a salesman and a branch manager. This is going back a long time ago, even before the last war. I think he started with us before or during the last war. And he grew up, as salesman in Omaha, and finally became

(1589a)

salesman in Chicago, and sales manager of our company, and left, and went into business for himself, and went into Miami and opened up a first-run theatre there, and from there he has developed his interest down there. But our position is still there. There is Paramount down there, which we do not sell.

(1590)

Q. In Birmingham, Knoxville and Chattanooga, whom do you license? A. We license the Wilby Theatres, which

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R. B. Wilby operates, and an affiliate of Paramount, but we have licensed these theatres a long time. As a matter of fact in Birmingham we used to sell Hoblitzelle, who is an independent exhibitor, and Wilby was an independent at one time too. Hoblitzelle, he had an interstate circuit of theatres, he called it, vaudeville houses, and he had his house in Birmingham, which he turned into a motion picture-vau-
 deville and picture house, and I think Paramount tried that along with Wilby, and it has been Paramount-Wilby affiliation in all three towns, but we served these houses even before that, as I say, when they were independent operators. Wilby has been an exhibitor down there as long as I can remember.

Q. With whom do you negotiate for these three cities?

A. Wilby.

Q. Where are the license fees paid? A. Atlanta, Ga.

Q. Are these the only three cities that you negotiate for with Mr. Wilby? A. Of the 92?

Q. Of the 92. A. Yes, sir.

Q. I think I didn't ask you that question about Tampa and Jacksonville. Those are the only two you negotiate for with Mr. Rogers? A. Yes.

Q. Of the 92? A. Of the 92.

(1591)

Q. In Nashville, whom do you license first-run? A. Sudekum theatres. They have opposition. Loew's theatre, Orpheum theatre. We have served the Sudekum theatre for a great many years, Paramount Palace.

Q. You license no pictures to Loew's? A. No, sir.

Q. Sudekum, or Crescent Amusement Company, is an independent? A. To my knowledge, it is.

Q. Whom did you negotiate licenses with? A. I haven't done business with Sudekum in a little while, since the consent decree, but that is where our pictures played, but they were worked out down in Nashville.

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Q. In New Orleans, whom do you license? A. We license our product to Saenger Amusement Company—Publix-Saenger, I suppose—which is headed by E. V. Richards, and we have done so for a great many years. We did it before, I guess, Richards became affiliated with Paramount, although they go back for quite a while, but they had the Saenger theatre—the Tudor Theatre and Globe Theatre. They have opposition down there. Loew's have a house. I think I heard some testimony that Paramount has an interest in it. And RKO operate two theatres down there. We have done business with Richards, Saenger & Company—Saenger-Richards it was years ago—we have done business with them a great many years, not only first-run New Orleans, but throughout their territory.

(1592)

Q. What kind of theatre is the Saenger Theatre? A. One of the finest theatres down there.

Q. Most of your product plays in the Saenger Theatre? A. Practically all our better products play there. We do play some pictures—we have played some pictures over in the Center Theatre, which is an independent operation, smaller pictures, but we always offer them, if we have them available. Saenger sometimes move over some of their pictures but they generally play first-run and complete their engagement in the Saenger Theatre.

By the way, we have sold a few pictures to Loew's when we had—not Loew's; I mean we didn't sell Loew's; we sold some, because we couldn't get together with Mr. Richards, to, I think, his competitor, Mr. Gaston Dureau. They played the picture at advanced admission. And we sold RKO a few pictures at the time we were licensing these pictures in groups, and they couldn't see the value of it, and we sold them away from them, but we generally go back, right back with the next block and offer it to Mr. Richards for the Saenger Theatre, because that is the better outlet for us.*

*See p. 1229 for corrections.

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Q. Mr. Richards would not play at advanced admission prices? A. Would not play them from us. I don't know whether he has done it with anybody else, but he wouldn't do it from us.

(1593)

Q. And said so? A. Definitely.

Q. Is New Orleans the only city among the 92 in which you deal with Mr. Richards? A. Yes.

Q. Of course, Mr. Kupper, you deal with these various buyers for other cities under a hundred thousand population?

A. Various buyers for other cities? Sure.

Q. In Memphis, whom do you license first-run? A. We license Loew's. They have two theatres there, the Palace and the State, and we play all our product there in the Palace and the State. You have opposition down there. You have Warner affiliation operating a theatre, we have Paramount, which is the Paramount Lightman. Before Loew's had it all, both the Palace and the State, Lightman I think had a Palace Theatre with Loew's and they had some sort of arrangement, and then Lightman gave it up and he took another house, the Orpheum, down in Memphis, and he has two houses, incidentally. When Lightman gave it up and Loew's got it, we just kept our product in both houses, State and Palace, and we have occasionally sold Lightman a few smaller pictures. He has a house that is suitable and adapted for them.

Q. Has Warner a house? A. Warner has a theatre. I don't think we have played in there. If we have, I don't recall it. I don't think we have played in there a long time.

(1594)

Q. You said the Loew's theatre had opposition. What do you mean by that phrase? A. Well, they have other first-run houses comparable to theirs that play their merchandise.

Q. In competition with them? A. In competition to them, yes, sir.

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Q. In Louisville whom do you license first-run? A. Well, Fred Dolle is an independent operator and has been there as long as I can recall. We have served him a great many years, both there and in Indianapolis, incidentally. He has opposition there. He has got Loew's in opposition, and Warners I think. I think Warner has got an interest in a theatre there. At least they play their product in one theatre. I always thought they had. But Fred Dolle, he has been there. And there was another man there, Ike Libson. He was a good friend and account of ours in Cincinnati. But we sold Dolle there all the time and he has been sold there for years.

Q. In the evidence already there has been some reference made to the National Theatre in Louisville. Do you know it? A. Yes, I know the theatre. I have been there. I went out to see it. It has been a theatre that has changed hands a lot of times. In fact I was telling you about Ike Libson. He had it at one time and he paid the people he leased it from \$20,000 to walk away from it. He couldn't operate it and he was a (1595)

big, important exhibitor, operated a lot of theatres in Cincinnati. I know Fred Dolle, our present customer, an old customer, had it one time for a few weeks, and he walked away quick. It is in a bad location and the house is not in good shape. It is very close to the colored area in the town. In fact there are two first-run colored houses right within a block or so of this theatre, and I doubt whether anybody could operate it as a first-run theatre.

Q. Do you consider it a suitable outlet for Fox pictures? A. No, sir. I consider the outlet we have as good an outlet as we could get in Louisville. That is why they have been a customer and we have sold them so many years.

Q. In Cincinnati, to whom do you license? A. RKO, operating theatres there, but there again we have theatres that Ike Libson had for a good many years, whom we sold, and just through the course of events we have continued to

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sell. They own the theatres they operate; that is, the first-run theatres. The Albee Theatre is the best but we try to play our pictures in the Keith following that, and then they have other houses they move over to, like the Lyric and so on, but that has been an old established account for a good many years down there.

Q. You knew Mr. Libson? A. I know him very well.

Q. Dealt with him before you ever sold to RKO? A. Yes, sir.

(1596)*

Q. Youngstown, Ohio. A. In Youngstown, Ohio, we sell Shea—M. A. Shea. That is the same Shea that has the Fulton in Pittsburgh and the Opera House and so on, been an account for many years, and had the Park Theatre there. Then Warners went in there and they have a house there, which Shea operates with Warner, and their theatre, the Park; also another theatre there, Harry Cathone owns; I think somebody else has got it now. It is a good house but we have always dealt with Shea, which was our account a long long time ago, and we continued on through him.

Q. In Exhibit 12, which has been offered in evidence, we classified Youngstown as a Warner town. Do you consider that Warner Bros. is your customer in Youngstown? A. I never did, no, sir. I always considered it an independent operation which Shea operated, which Eddie Grainger operates today.

Q. You don't license your pictures in Youngstown to the Warner and Park theatres because Warners have an interest in the theatre? A. No, sir. We license them to Shea and Eddie Grainger, and, as I say, they have some pooling arrangement they make and we play our pictures in both theatres, but—

Q. You had no part in making the pooling arrangement? A. Nothing.

(1597)

Q. In Cleveland, Ohio, whom do you license? A. We license to RKO.

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Q. Cleveland? A. In Cleveland, RKO operate the—well, they have the Hippodrome and the Palace. They are the two better first-runs. And they have a move-over theatre, the Lake Theatre. And they also have the Allen Theatre, which they operate. And Loew's have two or three theatres there. We sold a good many years ago the Hippodrome before they became a part of RKO—was an independent operation—we licensed our product. I think the name was Doty, the man that operated it, and there was a first-run theatre—

Q. He sold out to Warner Bros.? A. No, I don't think he sold to Warners. He sold to RKO, I think. It was RKO. In fact Warners have another in there—I think Warners have some interest in the theatres. In fact they operated the theatres for a time back, two theatres. They acquired it from RKO with some arrangement somehow. We have continued to supply these houses.

Q. Is the Hippodrome one of the best theatres in town? A. It has been for us for years. We have taken out a lot of film rental in that situation in the Hippodrome.

Q. That is Doty's original theatre? A. Yes.

Q. Canton, Ohio, whom do you license first-run? A. An independent exhibitor named Constant, who has got War- (1598)

ners in there as opposition. In fact, we used to do business with Warners in this situation, and we couldn't see eye to eye one particular year and, well, we are out in the cold, you might say, there. Warner dropped one of the theatres, and Constant went in, this independent, and he opened a theatre and from then on we have been supplying Mr. Constant. We don't sell or license Warner; and Loew's have a theatre there, too.

Q. What is the comparative quality of the theatres? A. I think they are pretty equal.

Q. In Columbus whom do you license first-run? A.

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Columbus we license our product to both Loew's and RKO.

Q. Do you split your product? A. Yes, we split our product.

Q. On the RKO split, where do the pictures play? A. They play in, I think it is the Palace theatre. Loew's play the Ohio and the Broad; RKO have two theatres. Here again is an old story, goes way back. I could bring you back to 1919, I guess, or 1920, right on up through. They were small accounts. In fact Neff was finally the last one that had been before he sold to RKO. Warner, I think, or somebody got him out, and RKO put the Palace theatre in there and we went and sold RKO because we could not get along very good with Neff, he could not see—he did not progress and advance with the times, keep abreast of the (1599)

times at least, and he wouldn't give us the kind of runs we thought our product was entitled to. We made a deal with RKO in the Palace theatre. In fact, Neff didn't need it; he got plenty of product; he practically had an exclusive contract with Warner and he got along pretty well, but that is the history of Columbus. We split our product between the two of them.

Q. These are the only four first-run theatres in Columbus? A. That is right.

Q. Akron, Ohio. A. Well, Akron, Ohio, we sold our product there for a good many years to Shea, been our account, the only account. Loew's is in there with a theatre. This fellow Katz, Sam Katz, I think Sam Katz, he sold some theatres down there. He doesn't operate them. Somebody else operates them for him. Warner is in there, too. But we sell Shea, and have for the last seventeen or eighteen years, the Colonial theatre. I think we do just as well as they could do for us; I mean with Shea.

Q. In Dayton, Ohio, who is your customer for first-run product? A. Our customer is RKO, a subsidiary of this

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defendant here, I guess you would call it. We have done business there a good many years with RKO.

Q. Don't cover your mouth. A. With RKO. I think Ike Libson was in the town at one time and he was our account (1600)

and he sold RKO. That is how it became RKO, I mean I am not quite sure, but that is the story.

Q. Mr. Keyes has a theatre there called the Victory? A. He has a Victory theatre. I forgot that for the moment. He has the Victory theatre. We have sold him some pictures in there—two, in fact—only recently. We sold him two pictures but the revenue was not very much to speak of. Would not be a good desirable outlet for our pictures. That is, we could not get the revenue that the town should throw off, a town of that size, first-run.

Q. In Toledo, Ohio, whom do you license? A. In Toledo, Ohio, we sell a Paramount affiliation, Balaban & Katz, but it is operated independently and all our negotiations are made with the local manager down there, and our branch manager in Cleveland, but here is a situation, that for years we had an account that was a little ways out of town, we could not get downtown, did not have a desirable account down there, and we stayed with him until he just couldn't stand the gaff, let us say, and about 1929 we went and sold—they put in a theatre and we sold them. We have been selling them ever since.

Valentine is the Loew operation there. There is another independent there too, Skirball. We tried to sell Skirball but we couldn't do it, couldn't get the proper price. That was an independent. But we do sell Balaban & Katz, which (1601)

is a single operation in that territory.

Q. As far as negotiations of license are concerned, this theatre is separate from all other Balaban & Katz operations? A. Yes, and it is done with our local manager in

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Cleveland and their representative down there. I have never negotiated with the theatre. I know that is the history of it. It is done locally.

Q. Not in Chicago? A. Not in Chicago or New York, but right there in Cleveland, or Toledo, which ever they elect.

Q. In St. Louis whom do we license first-run? A. We license Fanchon & Marco. That is an independent operation, headed by Harry Arthur. I think it is Fanchon & Marco Theatres Corporation. They operate the Fox theatre and the Ambassador theatre, and they also have several houses, the Missouri theatre, which they use as a move-over, and Detroit, a move-over. I believe they still operate the St. Louis. Loew's is also in opposition in that town. They have two theatres.

Q. Mr. Harry Arthur has all the first-run theatres except the Loew theatres? A. That is correct. One of those theatres, incidentally, is a Fox—a house that Fox built—I mean William Fox—but we were in the town a great many years. We had a theatre there. I recall it distinctly. I think it was (1602)

called the Liberty theatre, and, of course, that was in the early days when Fox went in there. It is away back in the 1900's. It couldn't develop into anything like what you have there today. But Paramount put in a theatre—Kopler is the fellow who put in the St. Louis theatre. He is an independent operator. And I know Skouras put in a theatre, when they were operating down there, the Ambassador theatre; Loew's had one; Fox had one, too, the biggest and best of them all. So we kept playing there, and I guess the only reason Fox went in was he did not think we were getting the proper representation or outlet.

Q. Mr. Kupper, you have mentioned that several times in the licensing of your pictures. It is from time to time necessary to have a controlled outlet for your pictures?

A. Well, frankly, I would like to see Fox have one in every

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key city in the United States. That is my personal opinion about it. To me it is very important.

Q. Do you think that you would get a better exploitation of your pictures if you did have one in every key city?

A. I know where we have them we do, so I assume you would there, too.

Q. Was it true that in the late '20s, when Mr. Fox was building these large theatres, that you were having difficulty licensing pictures to the established theatres? A. Yes, (1603) sir.

Q. In St. Louis, you grant Harry Arthur clearance? A. Yes, sir.

Q. He has, incidentally, he has a lot of subsequent-run theatres in St. Louis, and the first-run houses grant a clearance over those houses, who in turn are granted clearance over other houses that follow him.

Q. Is there any difference in the way that Fox pictures play in St. Louis from the way they play in Boston? A. You mean as to clearance?

Q. Clearance, run, admission price? A. Clearance may vary, that is the only difference, but there is still the same principle and the same way that they are licensed. We license them all with the clearance. And their admission prices may vary. I don't know just what the admission price is in each of these houses you are talking about, Boston, New York. They may vary, but there is still an admission price and it is always taken into consideration, and the clearance is always a matter of consideration and a matter in the license.

Q. As I understand it, in St. Louis, aside from one theatre operated by Loew's, every other theatre in the city is an independently operated theatre? A. I think Loew had two theatres, Mr. Caskey. Yes, outside of those two, they are operated by Harry Arthur, or the Fanchon—I don't know

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(1604)

the company name. I think it is Fanchon & Marco Theatre Company, or something, but Harry Arthur operates those theatres.

Q. The first-runs? A. The first-runs.

Q. Then on the second-run he has some first-runs, and Mr. Warrenberg has some second-runs? A. Yes, and Kine-man follows him too. He has opposition too, as a matter of fact, in some second-runs, some sections.

Q. But aside from these two Loew's theatres in this great city of St. Louis, all the other theatres are independently operated and owned? A. They are independently operated by Harry Arthur. I don't know whether he owns them. He owns, he leases them, but operates them.

Q. That is first-run. I mean subsequent-run, there are also no affiliated theatres? A. No, there are not—not to my knowledge. I don't know of any.

Q. And the same pattern of clearance? A. Let us get that question correct. Affiliates—you mean of any of the defendants?

Q. The five defendants? A. They are affiliated with Arthur.

Q. That is right. A. He has got them.

Q. But not with any of the five defendants? A. No, sir.

Q. To your knowledge? A. That is right.

(1604a)

Q. Is the same method of distribution, as far as prior run, clearance and admission price, followed in St. Louis as is followed in say Boston? A. Yes, sir.

(1605)

Q. In Indianapolis, whom do you license first-run? A. An old established account, Fred Delle, who operates the Fourth Avenue Amusement Company. He has the Circle and the Indiana—I should put it the other way, Indiana and Circle. The Indiana is a little better theatre than the Circle.

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although they are both fine houses, and there is opposition. He also has the Lyric Theatre. But prior to that, having the Circle or the Indiana; he had a house called the Apollo, where we served him for a great many years, and he acquired these theatres, Fred Dolle acquired this Circle and the Indiana, and which are better houses, I say, than the Apollo, that was torn down. Loew has an opposition out there.

Q. How long have we served Mr. Dolle? A. As far back as I can recall, in Indianapolis.

Q. In Indianapolis do you grant Mr. Dolle clearance? A. Of course we grant him clearance.

Q. And he has a prior-run to the other theatres in town? A. Yes, sir.

Q. Same pattern of distribution as in Boston? A. Yes, sir.

Q. Kansas City? A. Yes.

Q. Fort Wayne, Indiana, who is your first-run customer?

A. Same customer we had for a great many years, an independent operation for a long time, I think the Quimby (16000)

Estate. Fred Quimby used to head the company, Quimby Enterprises. He died. His widow still maintains the business. But there at one time I think he made some kind of deal with RKQ, I think it was, but he got the theatres back, and we have stayed and played with his theatres for a great many years.

Q. You licensed the theatres before he sold any interest to any of these defendants? A. Yes.

Q. Thereafter he got the theatres back and you continued to license him? A. Yes; and when he didn't have them, we continued to license them.

Q. There is another theatre operates first-run in Fort Wayne, is there not? A. Yes, a small theatre, very small theatre. It plays westerns and anything like that. I would not consider it a comparable first-run theatre, five or six

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hundred seats against theatres of 2,000, 2,800 or 1,800, things of that kind.

Q. South Bend, Indiana, whom do you license first-run?

A. It is a Publix affiliate in South Bend, Indiana, been all along, as far as I can recall, and as far back as I can think, we have sold them.

Q. How far is South Bend from Chicago? A. Oh, not very far. Short ride on the train, short ride in an automobile, but I don't know exactly the mileage.

Q. Whom do you negotiate your license with for this (1607.)

theatre? A. That is done in Chicago with Immerman, who is the local manager, but generally, I think it is done with Frank Dromey, who is the head of the booking and buying department. That is done with our Chicago office.

Q. Gary, Indiana, whom do you license? A. Gary, Indiana, we have an independent account there. That has been for a good many years, as long as I can recall. In fact, when I was in Chicago, I think he operated a theatre there, I mean, when I was a manager in Chicago. A fellow by the name of Young has been operating there. And we have operated and sold our product up there all these years. They have opposition. Publix is in opposition. It is a Paramount affiliate.

Q. In Gary, are the theatres in Gary subject to the Chicago clearance or are they not? A. Yes, sir, they have been. I know they are now.

Q. In Chicago whom do you serve? A. Balaban & Katz theatres today, and they, of course, have some opposition in there. RKO is in the situation. But B. & K. operate, I think, the four theatres, the Chicago Theatre, to me, is one of the outstanding theatres in the country; they also have another house, State-Lake, which is not as large as the Chicago, but it is a very fine house and it is operated generally on a long-run policy. They had two other similar houses, the Roose-

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(1608)

velt and the United Artists theatres, and I think that they have several other houses. They have the Apollo and the Garrick theatres. They were legitimate theatres that had been converted into picture houses. They have opposition. There is an independent house there, the Woods Theatre, operated by a man named Silverman, and that is right next door, I think, right close to the Garrick Theatre—Publix operation. As I say, RKO have two houses. They have one good-sized house and one smaller house. But we have been selling RKO for a long time. However, there was a period when we didn't. I mean, probably that was due to the quality of our product, I don't know, but we did not. We had a theatre there Fox was going to go into at that time, and to open; there was a theatre called the Monroe Theatre which was in a very poor location, in the financial district. Why they ever opened it there, I don't know. At night you can imagine how many people there would be, just like down in Wall Street, you can imagine how many people you are going to get downtown at night. In any event, that is where we had a theatre, and years later, when Grainger came in, about his time, we began to get proper representation from B. & K., who have been our account ever since.

Q. That proper representation with B & K was before Paramount acquired any interest in it? A. Yes, it was, I am quite sure it was.

(1609)

Q. The Balaban brothers built the Chicago Theatre before Paramount acquired any interest in it? A. Yes. I think that Balaban & Katz, they are the same Katz, but it is an old firm, they had the smaller theatre before they had the Chicago Theatre. Just three, or four brothers, Balaban brothers, and they were all in together. In fact, they had First National at that time for a long time before Paramount had any part of it.

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Q. They were one of the large franchise holders of First National? A. I would say so, yes, very important part of First National.

Q. The Chicago Theatre was built right after the last war? A. Yes.

Q. Opened in 19—— A. Was built when I got there, and I can tell you when that was, to give you an idea when it was built. That was 1924. I know it was built quite a while before that. I am sure it was around 1920, 1921, perhaps.

Q. In Peoria whom do you license? A. We license an affiliate of Paramount, Central States Theatres, and a man Rubin operates that circuit. In fact, he was a customer of ours not only there but several other towns long before he became affiliated with Paramount. Just one of the old stories, Rubin is a customer—the Rubin family.

Q. In Chicago do you negotiate for Chicago, South Bend and Peoria, among these 92 cities? A. Yes, sir.
(1610)

Q. With whom are those negotiations conducted? A. South Bend?

Q. South Bend. Mr. Dromey? A. Mr. Dromey or Mr. Immerman in the B & K office in Chicago.

Q. In Chicago? A. In Chicago. Mr. Immerman and Mr. Dromey. John Balaban at times was in on it, but the other two are generally the ones in Chicago, and Mr. Rubin for the Central States in Chicago.

Q. Mr. Immerman? A. I don't think he has anything to do with the Central States. Rubin and his brother operate them. He has another brother, too, who is out in the field, district manager out there, but they still maintain their operation of those theatres. I don't think they are a partner of B. & K. and Paramount.

Q. They operate themselves? A. To my knowledge they do. To my knowledge, I always figured they did, always believed they were doing it.

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Q. You, in licensing to Peoria, deal with Mr. Rubin? A. That is right.

Q. For his theatre? A. That is right.

Q. The cities in Michigan which are operated by Butterfield in Grand Rapids and Flint, with whom do you deal?

A. With Ed Beatty, who is the head of the Butterfield Circuit. He has a man named Lee Brooks, another fellow that used to work for us a great many years ago. This is the (1611)

same story here. I have sold Beatty, and when he was—when Butterfield was alive and before Butterfield ever had any interest in it, when they were an independent operation, I always sort of considered the Butterfield Circuit operated by Ed Beatty a Butterfield circuit. I never think of it as Paramount or anybody else, or RKO or anybody else. I heard it testified here before I went on the stand that they had these interests. I am not surprised, I had heard it, but I never knew it to be so direct as I got yesterday, but together they were always Butterfield theatres and Ed Beatty operated them and he still operates them.

Q. In licensing your pictures to these first-run theatres in Flint and Grand Rapids, do you negotiate with any representative of RKO? A. Do we? No, sir. Done with Butterfield in the First National Bank Building in Detroit. That is their offices.

Q. And he is the boss? A. He is the boss. He is the president. He runs it and has been running it—ran it before Butterfield died; he is still running them.

Q. Taking the theatres in Minnesota, Minneapolis and St. Paul and Duluth, who is your first-run customer there?

A. An affiliate of Paramount, Minnesota Amusement Company—I think that is the name—and John Friedl is in (1612)

charge of the operation. They are our account in those situations.

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Q. Does Mr. Friedl buy for these three theatres separate from any other so-called Paramount theatre? A. Buys our product separate and apart from anybody else, yes.

Q. There is opposition in Duluth? A. Yes, sir.

Q. Do you know the Granada Theatre? A. No, sir, I don't know it, sir. I haven't—I don't recall it, but I am sure it is not as big. It could not pay the rental we get there from the other people. I know the Norshor because I went up to see it open a long time ago. I don't recall it exactly. I know it is a beautiful theatre. I know it cannot compete in Minneapolis with the deals that these theatres make. We have two customers in Minneapolis. Let us take Minneapolis first. Years ago Pantages was our customer in the theatre there and Pantages was quite a theatre operator—he operated a chain of theatres—and then there was also Finkelstein & Rubin, they were an independent operation. They were the First National franchise holders out there, and well, we sold both of them, one time Pantages, another time Finkelstein & Rubin. Later on Pantages went out of the business, he got in personal difficulties of some kind, and, anyway, his circuit has evaporated. His son is still in business, I think he has a theatre out on the West (1613)

Coast somewhere, but the old man, he is gone; and now these theatres, which were Finkelstein & Rubin's—

Judge Hand: I think this is an awful lot of personal chatter mixed up with other things. Why can't you boil it down and not have whatever everybody was doing?

Mr. Caskey: Yes, your Honor.

Judge Hand: What became of people's fathers and all that kind of stuff.

Mr. Caskey: I do think this very directly tends to show why it is we license the theatres we do.

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Judge Hand: I know, but it is too much.

Mr. Caskey: We will go along.

Q. In Des Moines who is your first-run customer? A. We sell the Paramount affiliated Tri-State Theatres, operated by A. H. Blank and Ralph Branton.

Q. What is the opposition there? A. They have opposition. RKO has opposition there. They have the Orpheum Theatre there. It is an affiliate of RKO. We sold Blank for a good many years.

Q. Whom do you deal with in licensing pictures there? A. Generally with Ralph Branton, or Mr. Blank, but Branton is generally the one that we negotiate most of our negotiations with.

Q. Where does he have his office? A. Des Moines, Iowa.

Q. In Omaha? A. We deal with the same outfit, Blank (1614) and Tri-State Theatres and do our business with Branton out there, but it is done in Des Moines.

Q. What is the opposition? A. They have RKO in opposition there. I think there is another house in town operated—I know there is another house operated by a fellow named Goldberg. We don't sell him; we haven't sold him, but we have sold Blank a long time.

Q. Is the Town in your judgment a satisfactory theatre in Omaha, first-run? A. I think it is a very good theatre, but I don't think it can compare with the theatres we sell.

Q. As a matter of fact, you do license the Town subsequent-run at the present time? A. That is right.

Q. Des Moines and Omaha are the only two of these 92 cities in which Mr. Blank and Mr. Branton operate? A. Yes.

Q. Tulsa, Oklahoma, to whom do you license? A. We license Ralph Talbot, an independent.

Q. How long have you been dealing with him? A. A great many years. A great many years. In fact, he is the

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only one there. He has two fine theatres, I mean first-run. He is the only first-run theatre operator there. He has two fine theatres, the Orpheum and Ritz; and he has the Majestic and Rialto, which he moves over to. The Majestic, he generally moves over to; the Rialto he generally plays lesser quality product. He has no subsequent-runs, but there are (1615)

subsequent-runs in town. There is no opposition to him first-run.

Q. In Oklahoma City to whom do you license? A. We sell Joe Cooper's theatres there. That is Standard Theatres.

Q. That is the corporate name, but with whom do you deal? A. Generally with Joe Cooper, or he has got a manager now, who is back out of the Army, Pat McGee. He also has an office in Oklahoma City, and our boys transact a lot of business with them down there, but Cooper is the last word, as far as that is concerned; they have to take everything up with him, but he has been our account for quite a while.

Q. Was he the original account? A. No. The original account down there was the Liberty Theatre, which, incidentally, Cooper has got now, but that was a theatre that a fellow named John Sinopoulo owns, or owned in those days. I know it well because we served it out of Dallas. We did not have an office in Oklahoma City. There were three men in town you could sell, that were available for sale, if you could sell them. Sinopoulo had two theatres, he had one, the Liberty Theatre, which I remember, and another house; and then there was a fellow had the Empress Theatre, Tom Boland, who isn't there any longer. Sinopoulo then built what is now the Midwest. I guess it is as good as the Criterion. They are pretty much on a par, I know, in the revenue they pay on the pictures, and the Criterion was always (1616)

Joe Cooper's theatre. And Sinopoulo, when he built this

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Warner Theatre, Warners doing business with him, I mean, the Midwest Theatre, he lost it to Warner Bros., and I think he sold his interest to Warner Bros., and being our account, we continued to sell Warner Bros. until sometime that we couldn't see eye to eye, and then we sold it to Cooper. Incidentally he had two theatres way back in those days, the Capitol and the Criterion. The Capitol went out of business and became a commercial institution. So did the Empress, our affiliate. So today you have Cooper operating four or five theatres. He has the Criterion, the Midwest, which is a definite first-run for quality merchandise that he licenses. Then he has the Liberty Theatre and the Tower Theatre, which is a move-over from the Criterion or the Midwest. Then there is an opposition house there, the State Theatre, that I think a fellow named Dent put in there, which I don't sell. It is almost directly across from the Liberty, but it does not compare with either the Midwest or the Criterion, nor do I think the Tower, which is out in the suburban area.

Q. You have been in that theatre very recently? A. Yes, sir.

Q. Saw Mr. Wright there? A. I don't know whether I (1617)

saw Mr. Wright there. I saw a picture called G.I. Joe.

Q. In the Texas towns of Dallas, Houston, San Antonio and Fort Worth, whom do you license? A. We license our merchandise to what I call the Interstate Amusement Company, the head of which circuit is Karl Hoblitzelle, and the operating manager or general manager Bob O'Donnell. They are affiliated with Paramount.

Q. Were they always affiliated with Paramount? A. No. In fact, we sold them long before they were affiliated with Paramount. As a matter of fact, we came near acquiring those theatres way back, but they have been an account of ours; they have been an account of ours for a good many years. Prior, as I say, they were sold incidentally to RKO

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at one time, and then they got the houses back and then operated them again for a while. Then they made some arrangement with Paramount. Paramount was in the town; I remember they were there, incidentally. They had the Palace, the Queen and another old theatre, and Interstate had the Majestic all the time. So today Hoblitzelle is in charge of the operation, is a partner with Paramount, as I heard, and they operate these theatres first-run. There aren't any other first-run theatres in Dallas, but he has opposition in Houston. Loew is in Houston. We have never sold them, incidentally. We sold these, which were an account, as I say, for years prior to Paramount becoming a partner. Now, of course, the (1618)

product is used in both the A-houses, the Palace in Dallas, the Majestic in Dallas, the same way in Houston, and in the other towns.

Q. For years Paramount had theatres in these towns through a Southern Enterprise or some subsidiary? A. Yes, they had interests in the theatres, that were owned or operated there.

Q. And Hoblitzelle operated in opposition to them? A. Yes, sir.

Q. And in 1929 he made a contract to sell his interests to Fox? A. Around that date, I don't remember the exact date, but I know he was to do it and I know they had the papers drawn up, and I think they were signed, and then something happened and they were burned up and Fox got into difficulty—there was trouble, anyway. I was under the impression we were going to take him over. I was off on a trip.

Q. Subsequently he sold an interest to RKO? A. Yes, sir.

Q. And later to Paramount? A. Yes, sir.

Q. There is another circuit I am told operating in Texas called the Robb & Rowley. Do you know that? A. Yes, sir.

Q. They operate where? A. They operate in other towns in the State of Texas, quite a few towns, as a matter of fact.

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(1619)

Q. Also in Arkansas? A. Yes, sir. I know he has—they have a partnership with Paramount in Little Rock, first-run theatres in Little Rock.

Q. With whom do you deal in licensing your pictures to Robb & Rowley? A. We sell them to Ed Rowley, who is operating head of the circuit, and he has a general manager named Jones. We do all our negotiation with them down in Dallas—you are talking about the Little Rock operation?

Q. No, I am talking about their whole operation. A. Their whole operation is done in Dallas with our local representative there.

Q. As far as you are concerned, is the Robb & Rowley Circuit any part of Twentieth Century-Fox? A. Never was, to my knowledge.

Judge Hand: We will take a recess now until 2.15.

(Recess to 2.15 p.m.)

(1620)

AFTERNOON SESSION

WILLIAM J. KUPPER, resumed the stand.

Direct Examination continued by Mr. Caskey:

Q. Mr. Kupper, who is your first-run account in Salt Lake City? A. It is called Intermountain Amusement Company. It is an affiliate of Paramount.

Q. What theatres do they have? A. Well, they have the Senate Theatre, the Utah Theatre, the Capitol Theatre, Lyric Theatre and Studio Theatre. There is first-run operation and move-over operation.

Q. Who is the operator in competition? A. I think it is Tracy Barham?

Q. Tracy Barham is the Intermountain representative?
A. Yes.

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Q. And who is the operator of the Uptown Theatre? A. Joe Lawrence. He is an independent operator. The house was formerly named the Paramount, which Paramount lost the lease on, and he picked it up and changed it to the Uptown.

Q. Does Mr. Barham negotiate or deal for any other of these 92 cities? A. No, sir.

Q. Only for Salt Lake City? A. Only for Salt Lake City, but he deals—well, not of these 92. That is the only one.

Q. Now, in Tacoma who is your first-run customer? A. (1621)

That is an independent operation. John Hamrick, and a man named Edress, who is partner, or something; and they have several first-run theatres there. They have been an account of ours for a great many years; they are the Roxy and the Music Box. They are both about the same, I think, in seating and appointments.

Q. Mr. Kupper, we have been discussing these 92 cities. When did you first become aware of the fact that there were 92 cities having a population of 100,000 or more? A. The last couple of weeks when you asked me to check it. I did not know the exact number; I knew there was a lot of them but I did not know there was 92.

Q. Do these 92 cities constitute any special or unique market in the motion picture business? A. Well, they are the largest cities in the United States. I think they would stand up as very unique and very important.

Q. And are the cities of 100,000 or 50,000 in their turn important? A. Yes, sir.

Q. And so on down the line? A. Yes.

Q. Now, in selecting the first-run customer in all the cities in the United States from 100,000 down, do you follow the same general principles that you have discussed with regard to these 92 cities? A. I would say so, yes, sir.

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Q. Many of the customers are old accounts of yours?
(1622)

A. Yes, sir.

Q. Operated by people who have grown up with you in the business? A. Yes, sir.

Q. Many of the theatres which are owned by one of these defendants are theatres which you served before any one of the defendants acquired an interest in them? A. I am sure there are some.

Q. In general, they are the best theatres in the town? A. I would say so, yes, sir.

Q. And in those situations where they are not the best theatres, they are theatres which have produced a satisfactory revenue for the company? A. I would say so, yes.

Q. Now, in each of these 92 cities, with the exception of Somerville, Massachusetts, do you sell other runs besides first-run? A. Yes, we do.

Q. Do you sell any operator in these 91 cities who wishes to license your pictures at fair terms and on a run which is available to him? A. Yes, sir.

Q. I have excluded Somerville because I understand that suburb has only two theatres, and they both play together first-run. A. Yes. You might say there is only one run in the town; no subsequent run.

Q. But there are many theatres in that area which are competitive? A. Yes, sir.

Q. And you serve those? A. Yes, sir.

(1623)

Q. Now, in licensing your pictures how do you determine the amount to be charged to the exhibitor? A. Well, in the main our important pictures are played on percentage, and we have a pretty fair value. We know what the actual cost of the production was; we have previewed the picture ourselves, and from our knowledge of what a picture can do, or what we believe it can do nationally, we set—that is, Mr.

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Connors and myself and our sales managers discuss and decide at about what level in our sales we should sell the picture, whether it be percentage to a split or whether it be flat rental.

Q. When you use the term "flat rental" what do you mean? A. Well, generally they are the smaller calibre pictures, and they don't throw off as great a revenue. They have not got the box office draw.

Q. I know it is obvious, but I want it for the record: What is a flat rental price? A. A negotiated, stipulated, definite rental.

Q. \$100? \$500? A. \$100, \$500, whatever it is agreed upon, it is definite and positive and that is all you are going to get.

Q. And what is a straight percentage deal? A. Well, a percentage of the gross receipts that comes into the box office of the theatre that is paid by the public.

Q. Regardless of how much or how little is taken in? (1624)

A. That is correct.

Q. And what is a sale on a percentage to a guarantee or against a guarantee? A. Well, that is where we have \$100 guarantee against 35 per cent of the gross, for instance. That is a guaranteed film rental that we are going to get, again, irrespective of what goes in. Of course, if it goes over, you are going to get more; and if it does—well, take another example, a hundred dollar guarantee against a percentage to a splitting figure. Well, let us take 35 per cent of a thousand dollars, so that is the splitting figure; well, when it hits that you are going to get \$350, and the guarantee didn't mean anything. But it is a protective measure for you; at least you know the least you are going to get.

Q. And you use these four methods of pricing your pictures throughout the country? A. Yes.

Q. Is there any distinction whether the particular ex-

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hibitor you are negotiating with is affiliated with one of these defendants or is not? A. No.

Q. Now, there is some confusion in my mind about three terms: World premiere; pre-release; first-run. Will you clear them up for me? A. I will try to. A world premiere—and as an example I can cite one that is going on right now in Chicago—we have a very fine and very important picture, (1625)

a very expensive picture, a picture which we know and believe—at least we believe—will be a great box office attraction. Incidentally, it is a picture involving two very prominent and artistic young ladies, the Dolly Sisters. One of the girls happened to marry a man named Netcher, which was quite a department store operated out there in Chicago, and we thought it would lend itself and have some advantage in the publicity, because, after all, she is more or less socially prominent, or, at least, the family is socially prominent, and it builds itself in Chicago. So we decided we would like to have a world premiere in Chicago, having these things in mind, and thought we could get, and did get, and secured the Chicago Theatre to operate—to release it, and licensed this picture for the world premiere. Now, we did not exhibit it or try to exhibit it in any other theatre before we established—we may have tried to negotiate for license, but we did not offer it or give a play date on it until after we had opened in Chicago.

Q. Now, did you have a band and parade, and the mayor throwing out a baseball? A. We had a tremendous campaign. We had some stars come in there, a number of them; one of the girls, particularly June Haver, who was in the picture, a very important part—she was one of the Dolly sisters; and we had the producer of the picture come there, who was a well known producer and theatrical man, George (1626)

Jessel, and a number of other stars; and as they were met

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we paraded them through the town, and the whole town turned out for them, even the mayor welcoming them to the city. Why, you could not get through State Street. They jammed them up and down. They had to have a motorcycle and a police escort to take care of these people. And, naturally, a lot of publicity emanated from there over the wires of the Associated Press to all corners of the country, and they all knew about it, and it was on the radio, and all of that, and that built it up. Now, that was a world premiere. That is show business.

Q. Now, this picture The House on 92nd Street, the exhibition at the Roxy, is, as a matter of fact, the first presentation anywhere in the world, is it not? A. Yes; but we did not do like we did in Chicago. We did not ballyhoo it to that extent. We did not advertise it as a world premiere.

Q. So that is just first-run? A. That is first-run.

Q. And what you referred to yesterday when you released the picture State Fair in a large number of Iowa towns following its opening in Des Moines was what you call a pre-release? A. Yes, they were all pre-released. And that is easily explained. That picture State Fair was set for release in October. I mean for the country. And we opened (1627)

it up out there in September in all these towns.

Q. Now, one of the allegations of the complaint is that there is some affiliation between Twentieth Century-Fox and the Randforce Amusement Company. In your dealings with the Randforce, with whom do you deal? A. There are two men I deal with, Louis Frisch and Sam Rinzler.

Q. Are they officers or directors or employees of Twentieth Century-Fox? A. Not to my knowledge, no.

Q. Do you deal with anybody at Fox in licensing your pictures to Randforce? A. Do we deal with anybody at Fox?

Q. That is right. A. No, we deal direct with them.

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Q. And do you deal with anybody at RKO in licensing your pictures to Randforce? A. No.

Q. Now, with regard to Skouras: You, of course, know that the three Skouras brothers have an interest in the theatre? A. In some theatres, yes.

Q. And when you deal with Skouras theatres, with whom do you deal? A. George Skouras, William White, and a man named Benes. They have offices in Broadway.

Q. Do you deal with anyone at RKO? A. For who? Skouras Theatres?

Q. Yes. A. No.
(1628)

Q. Do you deal with Mr. Spyros Skouras? A. No.

Q. Or Charles Skouras? A. No, not the Skouras Theatres you referred to in the metropolitan area, no. But we deal with Mr. Charles Skouras.

Q. And this chain of theatres, one operated by Skouras Theatres Corporation, and the other operated by Randforce—are they parts of the old Fox Metropolitan Playhouse? A. Yes..

Q. Which went into receivership in 1932? A. They are.

Q. Now, to use a colloquial phrase which we used here the other day, have you and these other defendants ganged up on the independent exhibitors of the country?

Mr. Wright: That is objectionable, if the Court please; pure argument.

Judge Hand: I will allow it.

A. Ganged up? What do you mean by ganging up?

Q. I assume it means joining with these other defendants to injure or impair the successful conduct of their business.

A. Not in the least.

Mr. Caskey: Mr. Wright, I assume you will stipulate that if I propounded to Mr. Kupper the same ques-

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tions which were asked of Mr. Zukor, that he will answer them in the negative?

Mr. Wright: Yes, indeed.

(1629)

Mr. Caskey: You gentlemen may inquire.

Mr. Seymour: I would like to ask one question.

Cross Examination by Mr. Seymour:

Q. Is there any relationship whatever between the licenses which Twentieth Century-Fox negotiates with the various theatre operating companies in which Paramount has an interest for exhibition of Fox pictures in the theatres operated by those companies, and any negotiations for licenses for the showing of Paramount pictures in any theatres in which Fox has an interest? A. No.

By Mr. Proskauer:

Q. Is there any relationship

Mr. Wright: We will stipulate that he will answer no to the same question from all the other defendants.

Mr. Proskauer: It is stipulated that the witness will answer no to that question when propounded as to all the other producers and exhibitors.

Cross Examination by Mr. Frohlich:

Q. Mr. Kupper, I understand you testified that you had about 30 years experience in this business? A. I testified that I was employed by Fox Film, I think, October 7, 1919, and have been in constant service ever since with that company.

Q. Do you have a great deal of experience in selling pictures to the exhibitors? You did, didn't you? A. A great

(1630)

deal. yes, sir.

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Q. And when you came to sell a picture to the exhibitor just what did you stress as your most important selling point? A. First of all, it is box office. I considered its box office potentiality.

Q. Well, let us break it down a bit. You were not just talking about box office potentiality when you saw Mr. John Smith who owned a theatre and asked him to buy a picture, did you? A. Well, first of all I decided that I thought I would like to sell that picture to John Smith, and then I went to work and used every bit of salesmanship I had in my possession to get the price that I wanted.

Q. Well, in your salesmanship what did you stress as the important element in your picture? A. Well, it could be the story; it could be the star value.

Q. Wasn't it as a result the star value of your picture? A. Well, when we had star value I guess I used that most, yes.

Q. And you used that for a great many years while you were selling your pictures in block? A. Yes.

Q. And did you use that after you sold your pictures in small blocks after the consent decree? A. Yes, sir.

Q. And you still use that today? A. Yes, sir.

Q. And that is really the chief element that you stress in trying to get your customers interested, isn't it? A. They are (1631)

all elements in what I consider box office potentiality.

Q. Now, in stressing the star value of your picture today is it necessary for you to sell your pictures in blocks of two, three or five, or could you sell your pictures as you did in the old days in a season's product? A. Well, I think I could, yes. Do you mean if I had no restrictions on me to hold me back or prohibit me from doing it? I think I could. I did it for years.

Q. So you can sell your pictures either way, under the old system of block booking, or the present system that you

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employ of selling them in small groups? A. You are asking me if I or my company would have the ability to do it?

Q. Yes. A. I think we would. I think we could.

Q. Now, are you now selling your pictures in small groups? A. Yes.

Q. I understood you to testify yesterday that you were selling them in groups of two and three, as a rule? A. Yes. Yes, sir.

Q. And you have not gone back to the system of selling them in blocks? A. Blocks of two or three, or groups of two or three.

Q. When I speak of "block" I mean an entire season's product. A. No.

Q. You could go back to it if you had to or if you (1632)

wished to? A. I suppose we could, yes.

Q. But you prefer to sell in these small groups at the present time? A. Even though it makes a lot of work—it takes a lot more effort and a lot more work—I like it this way, and I think the exhibitors like it this way.

Q. And it takes a lot more money, doesn't it, in the way of expense? A. Yes, naturally.

Q. Your sales expense has increased substantially since the decree? A. Quite a bit, yes, sir.

Q. And if you did not sell a season's product in block your sales expense would be reduced? A. I did not hear that.

Q. If you went back to selling a season's product in block, your sales expense would be reduced, wouldn't it? A. I imagine it would, yes, sir.

Q. And you feel that you could do the same business with either method? A. I am not so sure of that. But I know we could sell the product. Whether we could do it as good that way as we do this way is something I can't tell you.

Q. As a matter of fact, the reason you have not gone back to the old system is because you are making more money with

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the new system? A. Yes, I believe we are selling to better advantage.

Q. Do you have reports of your trade showings? A. Yes, (1633) we do.

Q. And do you examine these reports from time to time? A. I have.

Q. And do you find that these exhibitors around the country go to these trade showings in large numbers? A. No, they do not. Very sparsely. I was very disappointed that they did not take more advantage of it.

Q. As a matter of fact, the exhibitor does not rely on the trade showing of a picture; he relies on the star, doesn't he, when he does business with you?

Mr. Wright: If the Court please, as to what the exhibitor relies on this man is not competent to testify.

Mr. Frohlich: This man is an expert.

Judge Hand: I am sure I do not know what it has got to do with the case, but I will allow it. Go on.

The Witness: The question again, please.

Mr. Frohlich: Will you read the question, please.

Q. (Read.) A. Well, if he cared much about the trade showing I think he would be there; so apparently it must be something else.

Mr. Frohlich: That is all.

Cross Examination by Mr. Raftery:

Q. Mr. Kupper, there has been some testimony here that there are approximately 17,000 theatres in the United States. Does that agree with your idea? A. I think I testified to (1634) more than that.

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Q. Well, you will admit to 17,000? A. Oh, yes.

Q. Well, they are divided into affiliated circuits, independent circuits, and individual operation? A. They are.

Q. And you have many individual operations where one exhibitor owns the one theatre; isn't that a fact? A. There are a lot of towns like that, small towns.

Q. And those are absolutely closed situations, are they not? A. Yes, sir; there is no opposition.

Q. And for the most part they are independent exhibitors? A. For the most part.

Q. The affiliated theatres are generally in the larger towns; isn't that a fact? A. Yes; but they are in small towns too.

Q. But for the most part, numerically, the great number of their theatres are in the larger situations? A. That is right.

Q. So, numerically, the independents far exceed the affiliated, isn't that right? A. In numbers of theatres, yes, sir.

Q. And since 1936 and 1937 this business has been a pretty prosperous business, hasn't it? A. I would say it has, yes, sir.

Q. Both in production and distribution and exhibition? A. I would say so, yes, sir.

(1635)

Q. And that same prosperity has extended through the operation of the independent accounts that you serve; isn't that a fact? A. I would say so, yes, sir.

Q. Have you heard of any theatres for sale around the country? A. Not very many; and I have not heard of any going out of business either.

Q. So when Mr. Caskey was talking about the ganging up situation, as far as you know, the independents have fared very well financially since 1936, 1937; isn't that the fact?

A. I would think so. I believe so.

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Q. Well, you know so from your own dealings with them, do you not; Mr. Kupper? A. I don't get around to as many small towns today as I used to; but it is my belief that that is the fact; and I hear from my salesmen that they are doing pretty well.

Q. And you have mentioned, I think, the name Nathan Yamins, did you not, this morning? A. Yes, sir.

Q. Operating independently in Fall River. A. Yes, he has been there a good many years.

Mr. Raftery: I should like to remind Judge Goddard that that was the man who swore to the affidavit before your Honor with the jurat at Palm Beach that cold winter's day when we were here.

Q. Now, about New York City: You have been selling (1635a)

pictures yourself around New York City a great many years?

A. Yes, sir.

Q. Or either yourself or your associates or assistants have? A. Yes.

(1636)

Q. And you have had many first-run outlets in New York City? A. Quite a few, yes, sir. A number of theatres play first-run.

Q. Do you have many more first-runs today than you had back in 1936? A. Yes, sir.

Q. Now prior to 1930, when you were working for Fox Film as distinguished from Twentieth Century, the RKO Circuit operated a fair number of theatres in the subsequent runs here in New York City, did it not, Mr. Kupper? A. Yes, they did.

Q. And before that the name was known as Keith-Albee, was it not? A. Yes.

Q. And those theatres for the most part were vaudeville houses? A. Vaudeville, vaudeville-picture houses.

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Q. And there were two classes, were there not; that is, like the Palace and the Riverside that played straight vaudeville and a newsreel, and those which played a combination vaudeville and feature pictures, is that right? A. Yes.

Q. And the Loew's circuit operated in a similar manner, did they not? A. Same manner.

Q. Except that the Loew's circuit were practically all combination theatres? A. They were.

Q. They did not operate straight vaudeville theatres? A. No, not like the Palace in those days. They generally (1637)

had vaudeville and pictures.

Q. And Loew's theatres long before RKO started featuring the picture, were featuring the picture equally with the vaudeville, were they not? A. Yes.

Q. And the Loew's theatres were the only people to play one picture with the vaudeville? A. That is right.

Q. There were no double features? A. Not in those days, not generally, no.

Q. And isn't it a fact that during that period, starting around 1924, 1925, up until sound came in and until sound took hold, the Loew's theatres generally played United Artists pictures, Metro pictures, and some Paramount pictures, in addition to vaudeville? A. That is right.

Q. So that United Artists was a customer of the Loew's Circuit way back in the silent picture days, isn't that a fact? A. I was always under the impression they used all United Artists pictures.

Q. Well, I will agree with you on that. And they used them back in the silent picture days and have used them ever since, isn't that a fact? A. That is correct. I think they have used them ever since. I have not checked but I think they have used them ever since.

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Q. Well, you watch the metropolitan advertising in the dailies of the second and subsequent-run houses, do you not? (1638)

A. Yes, sir.

Q. Now, the RKO later took over the Keith-Albee; that is, it became known as the RKO operation? A. Yes, sir.

Q. And gradually they went second-run and began featuring feature pictures with the vaudeville, isn't that a fact?

A. Yes.

Q. Now, all this time Fox pictures were playing primarily in the Fox houses in New York City with the second-runs, were you not? A. We were.

Q. You had the Audubon up on 168th Street, is that right? A. Yes.

Q. You had the Riviera at 96th or 97th Street? A. Up around there, yes.

Q. And you had theatres in Jamaica, Long Island?

A. Yes; Academy of Music on Fourteenth Street.

Q. And you had them in Brooklyn? A. Yes; and Jersey.

Q. And after a time, either during bankruptcy or receivership or some other Federal court procedure, the Fox circuit disintegrated, did it not? A. It did.

Q. And ceased to be second-run competition here in this neighborhood? A. Well, some of them are still in that classification.

Q. What do you mean, in bankruptcy or second-run?

A. That I don't know. I mean playing second-run, subsequent-run. But they are under different management. They (1639)

are not under Fox management.

Q. But there was a disintegration of that circuit? A. That is correct.

Q. So the phrase "Loew's split," referred primarily, did it not, to the pictures that played second-run or sub runs in the Loew's theatres; isn't that it? A. Yes, it is a term I

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think that was coined by the exhibitors. They play the same pictures that Loew played. RKO had some other type of pictures, and Fox had some other; so they say they play the Loew's split or the RKO split, or they play some other split.

Q. Now, Mr. Kupper, don't you know that there is an economic reason that those terms exist? Isn't it a fact that there are sub-run theatres in New York, unaffiliated theatres, that follow either Loew or RKO, and certain of them will not follow or play the so-called Loew's split, isn't that correct?

A. That is correct.

Q. And there are other theatres that won't play the so-called RKO split? A. That is right.

Q. And there is a big economic disadvantage between one and the other due to the fact that you have 40 RKO theatres as against about 60 Loew's; isn't that the fact? A. That is right.

Q. And you have to pick up your revenue from other sub-runs that are willing to play the so-called RKO split, isn't (1640)

that the fact? A. Yes.

Q. And those who play the Loew houses don't get as many sub-runs to follow, do they? A. I don't think they do. I don't know, but I don't think they do.

Q. Well, do you feel that you can pick up a sufficient amount of revenue to offset the difference between the 40 and 60 by playing the RKO split? Is that right? A. Well, I would not say that. I think we would be better off if we had the Loew split. They have twenty-odd more important theatres, and I think we would make a lot more money, and I think we would get a greater film rental out of the New York area than we do in the RKO split; but we can't sell them; and they have got enough product; and we have got to deal with RKO. But I personally would rather have the Loew's circuit as to revenue, total dollars, than the RKO, which I serve.

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Q. Isn't that true in many competitive situations? A. What?

Q. Isn't that true in many competitive situations, you can't get the houses you would like to get into? A. Yes, I guess there are some situations like that, yes.

Q. In other words, there is so much playing time in each house? A. That is right.

Q. And if somebody else has it, you can't get into it? A. That is right.

(1641)

Q. Now you told us this morning something about the great advantage of having show windows or places where you could get your pictures open first-run; and I think an exhibit went in, and Judge Hand asked the rest of us to get something like it, showing how you open all these runs, day and date. Well, haven't you got a competitive advantage of being able to sell your own theatres and securing that day and date playing between here and Los Angeles, that a company like United Artists or Universal or Columbia haven't got? A. I should think we would get more sympathetic treatment.

Q. You heard of the picture called, "I'll Be Seeing You"?

A. Who?

Q. "I'll Be Seeing You." A. Yes.

Q. You would say that was a fine picture, wouldn't you?

A. I would say so, yes.

Q. And would it surprise you to know that that opened in a Fox West Coast theatre on Christmas Day, and we could not get a showing in New York until a week after Easter?

A. It would not surprise me at all.

Q. In other words, you do run into these bottlenecks in playing time, do you not? A. Definitely.

Q. Well, would you say today this is an exhibitors' market? A. It has been for a long time.

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Q. And the distributors, in competition with each other, (1642)

are continuously fighting that exhibitor market; isn't that the fact? A. Yes, as long as I have been in the business we have been fighting it.

Q. And you have just as much trouble with our brethren here at the table as you do with the independents on the competitive feature, do you not? A. Yes, sir.

Mr. Raftery: That is all.

Mr. Seymour: May it please the Court, I haven't anything else to ask this witness, but Mr. Beatty, who was here yesterday, has been held over for Mr. Wright to decide whether he wants to cross-examine. I have furnished Government counsel with the documents he asked for yesterday. Mr. Beatty has a homing instinct and has an odd itch to get back to Detroit. I do not know if Government counsel will say they want to cross-examine or if they do not.

Mr. Wright: I have not had a chance to examine the documents, but just from looking at them, I think we want to put them in evidence; so if you want to explain anything you had better hold him over. I do not know that we want to cross-examine him, but we would want to put the substance of what is in here in evidence.

Mr. Seymour: If you say you don't want to cross-examine him, I want to tell him he is at liberty to go back to Detroit, which he wants to do more strongly than I would in his place.

(1643)

Mr. Wright: I do not see any reason why he cannot go, with the understanding that we will expect to offer what is in here. So if you have any explanation that you want to have him make, why you had better keep him.

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Mr. Seymour: I haven't any explanations I want him to make. And you can offer the exhibit.

Cross Examination by Mr. Wright:

Q. Mr. Kupper, getting back to the routine business of selling films, it was not clear to me from your direct testimony as to just where the final approval of the Fox film contracts lies, whether that is in New York City or somewhere else? A. Yes; it is in New York City. There have been others—they have been approved in the field, but in the main the final approval rests in New York, where the application for contract becomes a final contract with the signature of an officer of our company making it so.

Q. These four division managers that you referred to, those division sales managers, I think you said one of them was located in Atlanta, one in San Francisco. After they approve or recommend, then those contracts which they approve come to New York, is that right? A. Yes.

Q. And are approved here? A. Yes.

Q. And if approved here, signed by Mr. Connors? A. They are executed here in New York too, yes, sir.
(1644)

Q. By Mr. Connors, is that right? A. Yes, sir, or Mr. Michel. I think it is Mr. Michel, the executive vice-president.

Q. Well, either one, either Mr. Michel or Mr. Connors? A. They see that an officer of the company, that his signature goes on the contract.

Q. And in the course of selling to accounts that Fox serves, the salesmen in the exchanges have nothing to do, of course, with selling the so-called affiliated circuits, do they? A. No, I do not believe they do at all.

Q. And that is pretty much true of the branch managers also, isn't that right? A. That is not altogether true of the branch manager.

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Q. Well, he may be called in for discussion, but actually he does not negotiate in any deal, does he? A. He helps to negotiate; he helps to formulate the sales with his sales manager or district manager. He works pretty hard on those accounts.

Q. But the principal function of the branch manager and the salesman is, is it not, to sell the independent accounts in the area? A. The principal function of the salesman is to sell those accounts in his area, which generally are independent situations, small towns, and subsequent runs in cities; and the manager's responsibility is to see that they (1645)

are all sold, whether they are affiliated or whether they are circuits or whether they are independents.

Q. And you give the branch manager and the salesman quotas, do you, for what they are supposed to do from these independents, from independent accounts? A. You do not set it up for independent accounts. We set it up for the whole territory.

Q. How do you set it up? A. Well, in our case we have over years of experience found out what a branch—what percentage of the United States it is that that branch does, and that is the yardstick. It is what they do, and that is worked out percentage-wise over the country; and then we, in turn, break it down. It is not drawn off from just the independents or just the affiliated or their circuits. It is the whole.

Q. So that you do set a quota for each branch, is that right? A. Yes, the percentage of the gross.

Q. And within the branch do you have any quotas fixed for any particular accounts, as distinguished from others? A. No, we do not.

Q. You do not break down your quotas—that is, your particular salesmen don't have quotas for their territories? A. They have a percentage the same as we do at National*

*Change as indicated at p. 1229.

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for the branch. Each branch does it in turn for each salesman's territory.

(1646)

Q. Within the branch there are quotas for the salesmen's territories? A. That is right.

Q. And insofar as those salesmen are concerned, those quotas are independent account quotas, isn't that right? A. Yes, sir.

Q. And then, as I understand this progression of authority, anybody at any stage can always turn down an application, isn't that right? Of course the salesman, in the first instance, may not even take an application from the exhibitor? A. There is no sense in him writing it up if he has not got what he considers a fair and equitable proposition, because he knows he will be rejected.

Q. So he may reject— A. He will walk away.

Q. —and the branch manager may reject; the district manager may reject; and the division sales manager, all may reject? A. Yes.

Q. And the only one that may approve is the New York office, is that right? A. That is right.

Q. Now, in the process of selling, do you, as a matter of fact, do what you call setting your deals or negotiating your deals with your affiliated circuits first; do you not? A. Well, I would not say that, no. I think a lot of our salesmen are out selling the subsequent-run accounts long before we complete negotiations with circuits or affiliated circuits. We do not wait for them.

(1647)

Q. Well, regardless of whether or not they are taking contracts from subsequent-runs, it always is a fact, is it not, that you just cannot or do not make pictures available to the subsequent-run accounts until you have arranged your terms with your circuits or others that play the prior runs in the so-called key spot; isn't that correct? A. That is

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right. It is only natural. You would want to sell the first-run first, and then the subsequent-run from there on; but I thought you were talking about all salesmen.

Q. Well, I am talking about your general selling policy. I say it is a fact, isn't it, that before you would offer any run that is used by any key account, or before you make pictures available for exhibition following exhibition in those key theatres, you make your deals with your so-called key run accounts, is that right? A. First, yes, sir.

Q. Now these figures that you have tabulated here on this exhibit, F-12, Tree Grows in Brooklyn, these figures that you have were all equally available, were they not, in the interrogatory answers that were supplied as to the picture, Sweet Rosie O'Grady, that was given in answer to Interrogatories 6 through 11 inclusive? A. I assume so, yes. I don't know, though. I did not give any interrogatory answers.

(1648)

Mr. Caskey: We will have that chart tomorrow, Mr. Wright.

Q. I just wondered why a chart was made up on A Tree Grows in Brooklyn instead of Sweet Rosie O'Grady. Is there anything about this picture that you regard as more typical or more representative than the other one that was used in the interrogatory answer? A. I would not say it was. I was asked to get it.

Mr. Caskey: If I may interpolate, the chart for Sweet Rosie O'Grady, which is a 1943-1944 picture, is being typed at this moment; and this is one that I picked out for 1944-1945 as being the same type of picture.

Mr. Wright: I was just trying to get at the basis for the picture.

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Q. Now as I understand this chart that you have got marked F-12, all that this covers is simply the first-run exhibitions in these 92 cities of more than 100,000 population; is that right? A. Right.

Q. And of those, of the first-run revenue that you got from those 92 cities, as I understand your chart, only 16 and 47/100ths per cent came from theatres that you designated as independents here; is that right? A. Whatever it is, I don't recall now. If I can see it—

Mr. Wright: Give him a copy of it.

(Copy handed to witness.)

(1649)

A. (Continuing) Yes, sir.

Q. In other words, about 85 per cent of your first-run revenue in these towns came from affiliated— A. No, sir, that does not say that.

Q. Well, 83.73 per cent came from Paramount, Skouras, National, Loew's, Warner, Standard Theatres, RKO and Paramount-Publix, is that right? A. Do you mean you are adding up everything but the independent?

Q. Yes. A. That is the first-run revenue out of these 92 towns, and it is broken down there, the percentage of them.

Q. Well, can you just answer the question? A. May I have the question again, please?

Q. (Question read.) A. Yes, first-run revenue in those towns.

Q. And this chart, of course, does not even purport to reflect the percentage of total revenue that you get out of those cities that was affiliated revenue or came from these companies as distinguished from what came from independents, isn't that right? A. No. It is the first-run revenue.

Q. You have in many of those situations a very substantial amount of subsequent-run revenue from affiliated houses, such as what you get from the RKO circuit in New York;

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that, I take it, is excluded from this chart completely? A. (1650)

That is right. They are both affiliated and independent. There is a substantial amount of both.

Q. Now this U.S. Gross, October 13, those percentages there represent the amount or percentage of business actually billed as of that date, is that right? A. That is right.

Q. Now this column that is headed, "Per Cent of Estimated U.S. Gross"—just what is that estimate and when was it— A. Well, it was made the other day when we worked this chart out. As a matter of fact, we are always making estimates on our pictures, every quarter. In the years of our experience, we know what we have worked out, and drawn up tables—we have a tabulating department that can tell us, almost to the dollar what the expectancy will be at any period of time.

Q. And, of course, you make an estimate at the time you first put the picture in release, is that right? A. That is right, we do.

Q. And you are able to estimate within a small percentage or so what it is going to gross at the time you put it into release, is that right? A. We form and we work out an estimate, yes, on all pictures, what we think they will do nationally.

(1651)

Q. But I say, the estimate you make at the time you release it turns out to be substantially what you realize when you finally get through with the runs; is that right? A. Well, most of them are pretty accurate. Some we go off on. We make mistakes; some we make a little more on, and some we make a little less on; but in the aggregate we are pretty close.

Q. And these percentages are also predictable as of the time that you start the release here, is that right, the percentage of the gross you are going to get from these various

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interests that you have listed there? A. Well, I would say so, yes. It depends, of course, naturally, on the income at the theatre; I mean, the rentals they will take in as to what our percentage share will be.

Q. Now, you don't have any idea offhand as to how much of the total revenue that came out of these 92 cities named in the chart here came from affiliated theatres?

Mr. Caskey: I am going to have a table on that, Mr. Wright.

Mr. Wright: I just wanted to see if he knows offhand.

A. Offhand I don't know, sir.

Q. Now, I think you testified that at one time there you were out of the Warner circuit. That is, you were unable to (1652)

sell your films to the Warner Circuit anywhere in the country? A. Twice to my knowledge, twice that I have been negotiating with them, I have had to break off relationship, once for a short period, and finally we got together a little later—

Q. Well, the first time you refer to was the 1933-34, and the 1934-35 seasons, is that right? A. I can refresh myself on that. Somewhere around that time was the last time.

Q. 1933 and 1934 and 1934-1935, those seasons were the last seasons that you were out of the circuit, is that right?

A. Well, I would not say were entirely out of the circuit. We did not sell them. I remember distinctly the last time because John Clark was then our general sales manager, and I, were negotiating, and I had been carrying the negotiations; and finally we had a showdown with their buyer, Mr. Clayton Bond, and it was in the Park Central Hotel, and it lasted almost one night, and we came to the conclusion that we just could not sell them; so we went out and sold the lot—either sold the lot or developed a lot of opposition; and

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those accounts—we have never gone back to Warner's in those situations.

Q. Now, are those seasons you are referring to there the 1933-1934 and 1934-1935 seasons? A. Around that time.

Q. But you did not offer any of your pictures to any of (1653)

those opposition independents until after you had broken with the circuit on the circuit deal, is that right? A. I don't believe we did as long as we were trying to negotiate with Warner's, or whoever it was—it was Warner's in this case—we certainly were not going to offer it to somebody else.

Q. Did I understand you to say that you stayed with each one of the independent accounts that bought your pictures in those seasons after Warner left you out? A. To the best of my recollection we have to this day where we established a new account.

Q. Don't you know, as a matter of fact, that there were a number of those situations where when you got back into the Warner circuit you took the product away from the independent who had it without any negotiations with him whatsoever? A. No, sir.

Q. You don't know that to be the fact? A. I do not know that, no, sir.

Q. Would you say positively that it is not a fact? A. I will say positively it is, that a great many of the accounts that we took away and sold—and I remember a lot of them—

Q. I am not talking in terms of many; I am talking in terms of any. A. That we did not stay with that independent?

(1654)

Q. Yes. A. I do not know of any that we took the product away from.

Q. Would you say that there were none? A. To the best of my knowledge there were not any. I don't recall them.

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Q. How about Punxsutawney, Pennsylvania? Do you remember that one? A. I don't remember that one.

Q. Well, would you say that it is not a fact that you did take the product away from the independent there and give it back to Warner? A. I can't recall the individual situation. I remember Punxsutawney there.

Q. As a matter of fact, you don't know what was the correct situation? A. No, I do not know about that situation.

Q. And there are other situations that you do not know about? A. There may be, but I don't recall them.

Q. So, as you testify there now, you are not able to tell us the precise extent to which you took the product away from these independent accounts and gave it back to Warner, or the extent to which you did not, isn't that right? A. Well, I would like to refer to the record, but my best recollection is, a great many that we sold away, after we could not complete and work out our deal with Warner's, are still on our books, and still have used our product to this day.

Q. Now, can you answer my question? A. I have tried to. (1655.)

Mr. Wright: Read it to him.

Q. (Read.)

Mr. Caskey: I submit he has answered the question.

Mr. Wright: That calls for a yes or no answer.

Mr. Caskey: It does not.

Mr. Wright: Can you answer it?

The Witness: Well, let me study the question once more, please.

Mr. Wright: Read it again.

(Question re-read.)

A. Well, I can't remember every town that we had sold away from Warner's right at this minute any more than I can tell you—

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Q. The answer to the question is no, isn't it? A. I will try and answer the question fairly and honestly. I don't like to answer yes or no, but I do not say that it calls for a direct one. I may be mistaken. But to the best of my recollection—and I am almost positive—that those that we sold away and established an account, the product still remains there.

Q. Well, you don't know. But right or isn't it right, do you know now, that you did not take any back, or what is the fact as to your present knowledge, not what you think? (1656)

A. I don't know of any that we took it away from them.

Q. And you don't know whether there were such situations or not, is that right? A. I did not know that there were any such.

Q. I say now, do you know whether there were or not?

A. No, I don't know now.

Q. And it is also true, is it not, that in many situations instead of taking all of it back, you just told the independent that the product would have to be split with Warner in succeeding seasons? A. Well, I did not tell them that. I don't recall those situations at all. I am talking about—

Q. Well, would you say there were none of those situations? A. No, there are situations where we split the product with Warner and an independent.

Q. And situations where the independent had bought all your product, and then when you went back into the circuit with Warner you told the independent that Warner would get half and he would get half from then on? A. Probably did in those situations; that is the way we carried on.

Q. And that was without any opportunity as far as he was concerned to negotiate for keeping all of it, isn't that right? A. There could be situations like that, yes, sir.

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Q. And you just determined what the split should be (1657)

and that Warner would have the other half, is that right?

A. Well, it may be in a house that was not comparable by any means or stretch of the imagination that could support and handle that product, and naturally it was only a deal for a few pictures or a block of pictures, or, possibly, the product for that season; and we knew that sooner or later we might be able to work out a fair and equitable deal in those places.

Q. Now, with the exception of such independent accounts as may have been opened up as the result of this split that you had with Warner there in 1933, 1934 and 1935, can you point to any of those 92 cities that you covered where your product had played in an affiliated theatre and was then later offered to or played in an independent house on a regular first-run?

Mr. Davis: May I have that read?

(Question read.)

Mr. Davis: Does this relate only to the years 1933, 1934 and 1935?

Mr. Wright: No. I am covering the 92 cities that he testified to in his direct examination, and the period is the 1935-36 season to date.

A. Well, I believe Pittsburgh, Pennsylvania, is one where we definitely sold and have been selling the independent exhibitor. That is one of the 92.

(1658)

Q. And what was the affiliated house that you sold before you sold the independent? A. It was the Warner situation. They had the theatres, the other theatres.

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Q: That is, you sold—this was the situation where you had sold Warner prior to 1933-34; is that what you are talking about? A. Yes; that is what I am talking about.

Q. Now, I called your attention specifically to situations other than those which opened up as a result of that split. In the last ten years from 1935-36 on, can you give me any situation in one of those 92 cities that you covered where you had made product available to an independent that was formerly played by an affiliated theatre? A. No, I do not believe so.

Q. Now, in those 92 cities that you covered, and confining yourself to this same period, 1935-36 to date, can you tell me any one of those situations where you had negotiations with two or more affiliated exhibitors for a first-run of your product? A. Two or more?

Q. Yes. A. Well, generally—there are some towns where we split the product between two affiliated, and there are some towns where we split it between an independent and an affiliated. What do you want me to answer?

Q. I want to get what the fact is. A. How do we sell them?

(1659)

Q. Other than the situations in which you have split the product between two affiliated first-runs on an arbitrary basis, there have been no situations in those 92 cities where you have negotiated with more than one affiliated exhibitor, isn't that right? A. Where we have split the product? Well—

Mr. Wright: Wait a minute now. Listen to the question.

Q. (Read.)

Mr. Davis: May I ask whether that means simultaneous negotiations?

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Mr. Wright: I am talking about any time during the 10-year period.

Mr. Raftery: We are going to object to the use of the word "arbitrary."

Mr. Wright: Well, we will cover exactly what the nature of the split is later.

Mr. Raftery: We are going to object to this line of testimony for the reasons stated in our opening.

Judge Hand: Overruled. Go on.

A. Where there is an affiliated—where there are affiliated theatres, and there are two of them—

Mr. Wright: First, can you answer directly and then launch into your explanation.

Mr. Caskey: Let him answer.

(1660)

The Witness: I am trying, Mr. Wright, to the best of my ability; unless I don't grasp your question.

Judge Bright: Read it again.

(Question re-read.)

A. I believe that is correct.

Q. And where you had a split in those situations, those splits, as I understand it, have been made simply where you say that one gets a third and the other two-thirds, or one gets a half and the other gets a half, and it is determined on simply a basis where you say one exhibitor will sort out the pictures into two groups, and the other one makes the selection, is that right, or vice versa? A. That is right.

Q. So that in those situations the split that you make is in no sense the result of any competitive negotiations that you have with either of them; isn't that right?

Mr. Caskey: I object to that characterization of it. When there are two customers in a town and he sells to both, it is certainly competitive.

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Judge Hand: Overruled.

Mr. Davis: May I have that question read?

(Question read.)

A. No, it is not right.

Q. Well, then describe these negotiations that you have with them that you regard as competitive. A. Well, we (1661)

have been selling—let us assume—we don't have to assume; take a concrete case, if you want, where we sold one of the affiliates a half of the product and the other one a half of that product: Our organization knows what we are going to release, and it is, as you say, and as I have said before, well set up, these pictures, and we know when we have trade-shown them—we can't sell them before we trade-show them—they are there, and they see them, and it is convenient to us, and it saves us a lot of dickering and argument, and they will divide as they seem to think and try to be fair on the splitting of it; and then when they have decided which it is, then we go and sell and negotiate direct with each one individually, separately and apart, at terms we think those pictures are worth for those theatres.

Q. The only negotiations you have are with reference to the rental terms on which the pictures in the particular split play, is that right? A. Yes, sir.

Q. You have no negotiations with reference to how much of the product shall be split and how the split shall be made, is that right? A. Well, we sit in on it; at least our representative knows what is going on; and I assume he will try to guide them right; and it would seem to me that they would both want to get the best of any attraction; they would like (1662)

the best pictures; but it don't work out that way. He has to be fair because he knows the next time they are going to make the split the other fellow will take the advantage.

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Q. So it is worked out so that there is an alternative selection there which is not a subject of negotiation at all, is that right? A. Well, I would say that is correct.

Judge Bright: Who determines what the proportion of the split may be?

The Witness: Well, it is more or less handed down from our experience in selling the situation. As I say, when there was an equal split, there was never much trouble; and where you have one-third or two-thirds, even with independents or affiliated, that is a problem there, especially when you are only releasing a few pictures at a time.

Judge Bright: Who determines the split?

The Witness: We are supposed to determine the split, but we try to accommodate; we try to work with them and set it up so it will be fair for both; and I would say it is determined by the three of us, whoever is in the negotiation, or both parties to the negotiation.

Q. And in some situations you accomplish the same purpose that you do when you split the product by selling to a so-called pool of two or more of these affiliated theatres, isn't that right? A. Yes—

(1663)

Mr. Caskey: That question is objected to as to form.

Judge Hand: The witness says it is so. Objection overruled.

A. (Continuing) It will work out much the same way.

Mr. Caskey: The witness may have said he sold so-called pools, but I do not think he meant to say they accomplish the same result that was in Mr. Wright's question.

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Q. Now, getting back to this question of a road show for a moment: As a matter of fact, a road show is a situation where you have a special showing in a theatre before it is done anywhere else in the area but where the picture does not become available to other theatres in the area at the conclusion of the showing, isn't that right? A. It is not run the same as the regular run-of-the-mill product, if that is what you mean.

Q. That is, when you have a road show you simply take over a particular theatre for an advance exhibition, and you have a high admission scale, and you generally share in the profits of the run, and you play it for as many weeks as you think it will stand up, and then when you are through with it it still has to go into what you call regular release before it become available to anybody else in the area, isn't that right? A. Not so.

(1664)

Q. Do you mean to say that if you have a road show exhibition of a picture in a particular area, and then you put it into subsequent-run houses before it has any regular first-run exhibition at the regular first-run prices? A. I didn't say that. I said the road show—for instance—let me give you the whole story: Let us take *Song of Bernadette*. We opened it here in the Rivoli Theatre. I forget how many weeks we ran, 18 or 19 weeks; it was a picture in which the admission price was increased; and we set up a definite admission for road shows on that particular picture, I think it was 85 cents minimum in the afternoon and \$1.10 at night, or something of that nature, or 76 cents and \$1.10, and we offered that picture following the road show at the Rivoli Theatre to all exhibitors in the City of New York who were willing to buy it and play it at that admission price. That was the established price we offered it as a road show, and that was the only way we would license it. We would not license it any other way unless we did get that admission

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price; but it was offered for sale to all of them, and a lot of them played it following the Rivoli, and subsequent-run theatres.

Q. You mean in addition to a first-run road show you had a subsequent-run road show on that picture, is that correct?

A. Yes.

(1665)

Q. And then after you got through with all these road shows, then you put it into regular release where it went into the regular theatres at the regular first-run prices, and from then on down in accordance with the clearance, is that right?

A. We advertised at the time we solicited the licensing of the road show engagement that it would not be shown in any theatre in the United States for less than these admissions for at least one year.

Q. And it did not become available then to subsequent-run theatres on their regular policies until a later time when it was put into regular release through first-run theatres; is that correct? A. That is correct. If they had not so elected to play it on a road show basis at the prices we wanted, then it was not available to them until we had put it into general release at regular admission prices in the usual first-run manner, and from there on down in the area.

Q. After you get through with a road show, where you have a road show—I take it this table, this F-12 does not include any road show revenue. Was there a road show on Tree Grows In Brooklyn? A. No, sir.

Q. And such pictures on which you do have a road show, when you put it into regular release you then play it in the first-run theatres, is that right? A. Yes, sir.

Q. And on those first-run accounts that you referred to in your 92 cities, the affiliated first-run exhibitors that you

(1666)

named then have the privilege of playing the picture either simultaneously or successively in however many theatres

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they have that are designated as first-run on your licenses, isn't that right? A. After we license them they can, yes.

Q. After they have had such first-run exhibition as those accounts give them, then they become available to later runs in the area, is that right? A. On a regular basis, yes.

Q. And do you call each time, even though the picture may have moved from one theatre to another, and it may actually be successive engagements—you don't count those as additional runs for the purpose of considering what run the subsequent independent operator gets it on, is that right? A. Are you talking about the difference between road show and the regular?

Q. No, I am talking about your continued first-runs. If you sell an independent exhibitor in one of those first-runs in one of those 92 cities a contract which says second-run in the town, actually he may not get the picture until it has been played on successive engagements in two or three or perhaps four of the affiliated first-run theatres first, isn't that right? A. Well, no. If he has got a definite second-run contract—unless I misinterpret your question again—he is (1667)

going to get that picture second-run. Now, we have a first-run contract—let us say we have a license for first-run with an affiliate, and we license it for a theatre to play the picture, and we book it in that theatre—now, if you are referring to the fact that it was held over for a number of weeks—

Q. I am referring to the situation where he comes in and says, "Look here, I am supposed to have a second-run. Actually this picture has played two and three times ahead of me in these different theatres." And then you tell him, "Why, no, that does not interfere with your second-run; those are just continued first-runs or move-over first-runs; isn't that right? A. If they ask that question they would be told that, but we don't have it set up that way. They know what they are buying. They know what the first-run is and what the

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move-over is, and if there is going to be a move-over, and they are sold accordingly.

Q. At the time the subsequent-run makes his contract with you and a price is filled in for the picture, there is nothing said in his contract as to how many times the picture can or cannot be played ahead of him on a first or move-over first-run, isn't that right? A. Well, I know he is going to assume there is only one run to be ahead of him, whether it is continued in one house or moved over to another.

(1668)

Q. Can you answer the question?

Mr. Caskey: He did answer it, I submit.

Mr. Wright: Will you read the question, please.

Q. (Read.) A. There may be nothing said about it, but he knows the established principle and established business in the area, and he knows what transpires. He knows that he can't tell whether the picture is only going to play one week any more than we can. We assume that the picture will play maybe two or three weeks in a theatre, and it may only play one, or it may move to another house, or it may not move at all.

Q. So he does not know at the time he makes the deal with you how many times it is going to move over, does he?

A. He generally knows because it is usually only the one move-over that you get. You do not move to a dozen.

Q. It all depends on what the first-run operator and you decide to do with the picture, isn't that right? A. I suppose it is what we negotiate or license to do, yes. He would know.

Q. And you put nothing in your contract which restricts you in any way from moving over the picture in just as many of these continuous runs as you want to have it in, isn't that right? A. We don't restrict ourselves, no. We ne-

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gotiate, and you don't know as to what will make it available (1668a)

for a move-over and what will make a move-over.

Q. Now, in those 92 cities that you covered on your direct testimony, can you point to any situation there where an affiliated subsequent-run house plays a run of your films behind an independent who has a move-over privilege? A. Affiliated subsequent-run?

Q. Yes. A. I will look it up. I don't think there are any. (1669)

Q. You know there aren't any, don't you? A. I don't see them. I haven't got it through the list.

Mr. Caskey: Do you want to cross-examine or do you want to get the facts?

Mr. Wright: I want the facts, and I would rather have them from the witness, if he has got them.

A. (Continuing) Outside of Pittsburgh. I know our first-run account is an independent account. I know subsequent-runs there are a lot of Warner theatres.

Q. That is what I am asking you for. A. I am trying to get to that.

Q. In the situation where you have an independent, now, in Pittsburgh, does that independent first-run there have the privilege of moving over your pictures and does he move over your first-runs there to two or three theatres? A. The Harris Theatre, which is part of our product—licenses a part of our product, moves over—holds over, first of all, several weeks in the Harris Theatre. He can have a picture two or three weeks and then move it to the Center Theatre, which is his theatre.

Q. You have a move-over from the Harris to the Center in Pittsburgh, is that right? A. That is right.

Q. Before the pictures go into Warner second-runs, is that right? A. That is right.

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Judge Goddard: That is an independent?

The Witness: Yes, sir, independent.

(1670)

Q. Do you have any other situations like that? A. Let us continue on in Pittsburgh. It just so happens the party that licenses the other part of our product does not have a move-over there, and he continues playing longer in the one house.

Q. Who is the other party? A. Shea Theatres, Fulton Theatre.

Q. So that is a split of your product there between Shea and Harris? A. Yes.

Q. Shea does not move over but you say the Harris house may move over before it goes into the Warner subsequent-runs? A. That is right.

Q. Are there any others in those 92 cities where that occurs? A. I think that is the only one.

Q. Well, take your time, look at it carefully. A. That is the only one that I see, notice.

Q. As a matter of fact, how many of those 92 cities there can you point to where there is a subsequent affiliated run of any kind that plays your pictures after an independent first-run? A. How many? Probably Pittsburgh is the only one.

Q. Do you find any others? A. Wait a minute. I think Miami might be an exception. I think we play some of them. I am not positive of that.

Q. In Miami your Wometco Circuit has your first-run?

(1671)

A. Yes, and may have subsequent runs.

Q. Your subsequent runs go to Wometco too? A. They go to them, too. I was wrong there. No, I do not believe there are any on this list.

Q. In those 92 cities, can you point to those cities in which an independent first-run that you license takes clearance over a first-run affiliated house in another city? A. I don't think so, no.

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Q. I can give you one there. A. There may be one.

Q. Your Music Hall here in New York, of course, does take—— A. That is true.

Q. (Continuing) —clearance over some independent runs in some other cities? A. That is true.

Q. But apart from that, I mean, some affiliated runs in other cities, apart from the Music Hall. Can you give me a first-run independent theatre in any of those cities that takes clearance on your pictures over an affiliated first-run in another town? A. No, I don't believe so.

Mr. Wright: Have you one?

Mr. Caskey: We copied those clearance provisions in the record yesterday. I don't know where they are now.

Q. I think you referred in your direct testimony to these situations where the clearance that you have prescribes a subsequent-run for—or prescribes an admission price for certain subsequent-run theatres, and I call your attention to (1672)

one of them here, which is the clearance granted to Capitol Operating Company, Chester L. Stoddard, for the Capitol Theatre at New London. That is a Paramount affiliate. A. Yes.

Q. It says, "National release date." That means, I take it that it becomes available to this exhibitor when it is released nationally, is that right? A. I would say so.

Q. "30 days clearance in New London providing any subsequent-run house charges an admission price of not less than 25 cents for the entire orchestra at weekly night performances; if 20 cents, 120 days; if 15 cents, six months." Now, the statement as to the minimum adult admission prices, which are specified in the contract for the Capitol is simply none. Do you have any agreement in that situation with the Capitol as to what, if any, admission price it was

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to maintain as a condition of having this clearance over these subsequent-run houses? A. I imagine we did. I don't recall it right now. I don't recall the contract. What is the year of the contract in reference to, as to clearance?

Q. That is for the 1943-44 season, your first group of pictures, I believe Bombers Moon, Heaven Can Wait, Holy Matrimony, and the same clearance appears as that which your picture Sweet Rosie O'Grady had when it played that (1673)

theatre. As a matter of fact, in dealing with this particular exhibitor, this Paramount affiliate, in virtually no case did you actually require the maintenance of a particular first-run price by that exhibitor, isn't that right? A. I wouldn't say that. I think we do generally watch that very carefully, and if it was not in the contract, I don't know why it wasn't put in, and, naturally, he should be, as far as I am concerned, he should be more concerned about charging a good admission and a right kind of admission, because he gets the greatest share of the income at the box office. I may contract for that picture 35 per cent, but he is going to get 65, so why shouldn't he want to protect the box office receipts?

Q. I am not talking about what he wants to do. I am talking about what you did. A. Well, that is what we did.

Q. In those cases where you neglected to insert any admission price restriction for his prior run, that was simply a matter of inadvertence, was it? A. I would say so, because I believe that our local representatives, who work out those contracts and work out those negotiations, know his admission price right along, and if he ever varied, they would have been the first ones to get in contact with him and see if there was any change and work it out again. I do not believe (1674)

any one of our offices don't know the admission price in those theatres, and they have it as a matter of record right on their booking books.

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Q. No question of your knowing what the admission prices were. I am directing your attention now to what you required in the way of maintenance of prices by these affiliated first-run exhibitors that you do business with.

Mr. Proskauer: I am objecting to that as argumentative and repetitious.

Judge Hand: Overruled.

Q. (Continuing) As a matter of fact, in the great majority of the contracts you made with affiliated first-runs in this 1943-44 season you did not insert in the contract a minimum admission price that they had to charge; you know that? A. It should have been there. That is what the clause is put on there for and that is what the space is provided for and our instructions were it should have been on all contracts.

Q. As a matter of fact, you do give your first-run customers who happened to be affiliated with another distributor a great deal of latitude in the admission prices that they charge, isn't that right?

Mr. Proskauer: I object to that as incompetent and calling for a conclusion.

Judge Hand: Overruled.

A. We don't give them any more than anybody else, whether (1675)

they are independent or a small town or subsequent-run. They are all treated alike in that respect as any other.

Q. What you do, I take it, is reflected in the contracts that you made? A. Should be reflected there.

Q. In so far as you did not insert a minimum admission price requirement in the contract, then I suppose the maintenance of any price was simply a matter for further negotiation or adjustment between you and the exhibitor, is that right? A. It would be. I am positive—

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Mr. Davis: Will you read that question?

(Question read.)

A. (Continuing) No, I assume that our branch knew and understood that the same price was going to be maintained that has been established in the theatre.

Q. That was, then, just an informal or implied understanding that customary prices would be maintained by those accounts where ~~you~~ omitted to state the minimum admission price? A. Yes; and I should think it would go even further. It would be more than an understanding. They would assume it was a fact and a part of the negotiations, part of the license, even though it might not be there.

Q. With reference to this 25-cent price that is specified for subsequent-runs there which follow 30 days, that, I take it, of course, is a minimum price, isn't that right? A. I (1676) would assume so, yes.

Q. That is, 25 cents or more—if he charges 25 cents or more, he can play 30 days after first-run, is that right?

A. Is that what it says?

Q. I will read it again. All it says is, "30 days clearance in New London providing any subsequent-run house charges an admission price of not less than 25 cents for their entire orchestra at weekly night performances; if 20 cents, 120 days." Now I take it means if his price goes down to 20 cents— A. He goes back.

Q. (Continuing) —he is shoved back to 120 days. But suppose he raises his price from 25 cents to 30 cents; then what happens? A. It would be a matter of negotiation with us whether he would think it good business on our part. I assume in that situation, I am not as closely familiar with it as perhaps I should be, but it would be up to us to decide whether it would be good business on our part.

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Q. Actually, if he charges 50 cents, he still cannot play ahead of 30 days after this first-run, can he? A. It would be a matter of negotiation. I should think the first-run would be glad to have him go up in his admission. Certainly would be better for him.

Q. I understand he would be glad to have him go up in his admission, but he would not be glad to have him play within the 30-day period, would he? A. No, he would like (1677)

the given amount of protection, naturally, I would assume. He established that for the prior runs, were accustomed to getting it, and the public know about it, so he would naturally want that 30 days.

Q. Under this agreement I just read to you, he gets that 30 days protection whether the independent subsequent-run charges 25, 30 cents or 40 cents, is that right?

Mr. Caskey: That is objected to as purely speculative. There is no suggestion that in fact he did charge more or that he asked for anything. Mr. Kupper has repeatedly testified that if he did in fact charge the higher admission price, then the clearance would be a matter of negotiation, but now that negotiation would come out is purely speculative.

Judge Hand: Overruled.

Q. I am directing your attention to the situation under this particular contract, not under some contract that you may negotiate in the future.

Mr. Wright: Now will you read the question?

Q. (Read.) A. He gets that protection, because the next fellow cannot get it any quicker, unless he charges more than 25 cents.

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Q. So, regardless of what he charges— A. That is right, regardless of what he charges, that is written in the contract, he has got 30 days protection, any theatre charging (1678)

a certain figure there.

Q. Of course, when you are negotiating the contracts in the first instance, the admission price that he charges—

Mr. Proskauer: Mr. Wright, we cannot hear a word you say.

Q. (Continuing) When you are negotiating contracts in the first instance with any exhibitor, the price that he is charging or proposes to charge is an element in the negotiations, is that not right? A. Yes.

Q. And you recall that there have been systems of runs and clearances where the admission price actually did determine availability?

Mr. Caskey: That is objected to. Not any proof of any such thing in this case, that I know of.

Judge Hand: Overruled.

Mr. Caskey: Certainly should be made specific as to what he is talking about.

Q. Do you remember the question?

Mr. Wright: Will you read it?

The Witness: I think the question was—read it, it is easier.

Q. (Read.) A. Yes, there were.

Q. That was true in those early days in the 20s you were referring to where you say there were runs and clearances and anybody who wanted to charge a certain price could (1679)

have the picture on a certain run, isn't that right? A. Not anybody, no, but they were agreed upon, certain runs they

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could play at a certain specified time if they would charge a certain admission.

Q. I call your attention to Kansas City prior to 1935. Now, it is a fact, is it not, that that was one of the last places or last areas in the country where the pictures were released on a basis so that anybody who charged a certain admission would get the films at the same time as anybody else who charged the same price, isn't that right? A. I believe Kansas City was one of the last areas that had such an arrangement.

Q. Then along about the year 1935 Elmer Rhoden, the Fox manager out there, decided that he did not like that system, isn't that right? A. I don't know whether he decided or whether we decided we didn't like it, as far as we were concerned, and changed it. I don't recall exactly now who was responsible for it, but I know it was changed.

Q. A request for the change came from Rhoden, did it not? A. Maybe it did.

Q. Rhoden didn't like the idea of these independent theatres playing day and date with some of the subsequent runs that Fox was operating, isn't that right?

Mr. Caskey: That is objected to. That certainly (1680)

cannot be competent testimony, whether Mr. Kupper—

Judge Hand: Overruled.

A. I don't know what Rhoden liked or didn't like. He didn't tell me about it.

Mr. Caskey: Have you a copy of Judge Otis's opinion to hand up, Mr. Wright?

Mr. Wright: I would be glad to have the Court read Judge Otis's opinion. I don't propose to examine the witness on it.

Q. Then, in any event, you had some consultations with Rhoden about setting up a new system of clearance in Kansas

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City, is that right? A. Well, if we had consultations, we did—discussions, I will put it that way, probably about his clearance in all his theatres in the City from time to time. I don't know whether that is the date or around that period. We have had discussions on it, and I know a lot of local people have had discussions on it.

Q. When you got through with the discussions you came out with a clearance system something like this: where the pictures played first-run and then they went into a Fox house for an exclusive second-run, and then they went into another house, Fox house, for an exclusive third run, isn't that right, before they were released or made available to (1681)

any independent exhibitors in Kansas City? A. I think we did sell in that sequence to our own theatres first, yes.

Q. Not only you but all the other major distributors after the 1935-1936 season adopted this method of selling so that Fox would have an exclusive second and third-run in the town, isn't that right? A. Well, I don't know what they all did. It is a matter of record what they did, I should think, and if we did it, that is it; and if they did it, that is it.

Q. You know that is what you did anyway? A. I am pretty certain we sold that sequence of runs, yes.

Q. In which Fox had the second and third exclusively? A. Yes. I recall distinctly that we have sold Rhoden right along second-runs in the Plaza Theatre, even before this date you are talking about, and I also remember we sold him third-run.

Q. You know that Rockhill Theatre in Kansas City? A. I remember the name Rockhill.

Q. That was brought to the attention of the Court here on a chart. That was run by Rhoden for quite a number of years as a 15-cent house, wasn't it? A. I don't know. It may have been. I wouldn't doubt it. Probably was.

William J. Kupper—By Defendant—Cross

Q. And played, when it did, it played behind the independent Bijou there, that was charging 25 cents? A. It may have. I don't recall. Probably did, and that is what—
(1682)

Q. Later on, in about 1940, you recall the admission price of the Rockhill was raised to 25 cents? A. I don't remember that, no, sir.

Q. You don't remember when it was? A. No, I don't remember. If it was raised, it was raised. I don't remember.

Q. You recall it was raised to 25 cents? A. Yes, I think it was. I am quite sure it was, now.

Q. Then when Rhoden or Fox changed the admission price of the Rockhill, then it took a very substantial clearance over the Bijou, isn't that right, and moved it up ahead? A. I don't recall exactly what it was. I am sure they must have taken some clearance.

Q. You remember moving it up, that was moved up ahead of the Bijou, and taking clearance over the Bijou after they changed the price? A. I don't remember, but it could be possible.

Q. Do you have any recollection on it at all? A. It is vague to me right now, very vague to me, but I do know the theatre, and I know we sold it a run. I can remember, I am pretty sure, it was a 25-cent admission. I recall that.

Q. You know that the run was moved up ahead of the independent 25-cent run? A. No, I don't know that. I would have to find out.
(1683)

Q. I think you said in Kansas City you played your first runs there with Fox. In the Fox houses you have a simultaneous first-run in three different theatres sometimes, is that right? A. In Kansas City, Missouri, there are two. There is another house over the boundary. It isn't in Kansas City, Missouri. It makes three we play.

William J. Kupper—By Defendant—Cross

Q. What is that other house over the boundary? A. It is a house that has been opened not so long ago, and I haven't seen it myself. It is in the new area out there that has been developed since the war, quite a new, extensive area.

Q. What is the name of it? A. I think it is, the Fairview.

Q. The Fairway? A. Fairway, or something like that. I haven't seen it. I haven't been there.

Q. That is just over the border in Kansas, but in a suburban area of Kansas City? A. Yes, that is right.

Q. That was where, in the same area, where Mr. Dickinson has his Dickinson theatre there, the Mission? A. I think he had the Mission out there. I don't know just where it is. I never did see that, but I know he had a theatre out there.

Q. And you recall when Mr. Dickinson built and opened (1684)

his theatre, the Mission, he had to play 56 days after first-run Kansas City, Missouri, didn't he? A. I guess he did. I don't recall; if that was the clearance, that is what it was. I don't recall offhand. I know he had to play some time.

Q. And his theatre is not far from the Fairway, is it? A. As I said, I haven't seen either one. I don't know the area myself. I only know what I hear about it, and I don't know. I guess it is a good theatre, but I don't think it is as good as this—one that could be set up as a first-run.

Q. What do you hear as to the distance between them? A. I think they are pretty close. I don't think they are so far apart.

Q. Your Fairway Theatre there today is playing these pictures at the same time as downtown, Kansas, while Dickinson follows downtown Kansas City after a very substantial interval of time; you know that, don't you? A. Yes, I know that, yes.

Q. When you gave this testimony about the history of all these first-run situations, did you mean to give the Court the

William J. Kupper—By Defendant—Cross

impression that during, let us say, the last ten years, or during this period you have covered, your product was being played in the same theatres all the time? A. I tried to give the impression to the Court that our accounts—I tried to tell (1685).

the Court where the product was playing right now, and I tried to show the historical background, if it was the account. Certainly some of these theatres that we originally sold could have gone out of business but the same ownership might still be in these other theatres.

Q. The theatre situation is, of course, changed from year to year? A. Some places, and they don't change so very often.

Q. There are new ones built and sometimes some are dropped? A. You couldn't build so many in the last few years.

Q. You did not undertake to tell the Court, as I recall it, what happened to your pictures in the cases where theatres which had been using—had first-run, were either lost by the first-run account or dropped out of the first-run pool that was showing them? A. I tried to tell the Court and explain to the Court the exact situation as it existed, as I knew it.

Q. I did not see in your printed testimony or what you said on the stand any mention as to the Oriental Theatre there in Chicago. A. That is right, I gave none.

Q. It is a fact, is it not, that your pictures had been shown first-run in the Oriental when it was a Balaban & Katz house and after it ceased to be a Balaban & Katz house, they weren't shown first-run in the Oriental? A. I think there (1686)

were some shown there. There weren't many; there were some played, I am quite positive. Had, I think, a vaudeville picture policy, though I am not sure now. That is going back to 1935. I was not responsible for that area at the time. I think it was 1935, right?

William J. Kupper—By Defendant—Cross

Q. I think it was about 1938 when Balaban & Katz lost its interest in the house. A. Well, somewhere in that neighborhood.

Q. Since that time you have not had any regular first-run of your pictures in the Oriental Theatre at all, have you? A. No, we have not.

Q. Although that is the newest and best located theatre in that town, isn't it, and the next to the largest? A. Yes, it is a large house and a well appointed house.

Q. And in many others of these situations—you neglected to cover in your little history there what happened to the Roxy in Atlanta during the 1938-1939 season. You recall that? A. Before I go to that, do you want me to finish Chicago?

Q. Was there something you wanted to say about Chicago that you did not say in your other testimony? A. No, but I do recall Balaban & Katz operated the Oriental for a while, but I do recall they did not work out and they dropped the house, and somebody else, Johnnie Jones, I think, as a matter of fact, I think wanted to buy our product but we had the (1687)

established account in the situation, B. & K., who had other theatres and could absorb our product. We were satisfied to keep our account there with B. & K.

Q. In Atlanta, do you recall that Roxy Theatre? A. Yes, sir, I do.

Q. I think you described it as a smaller theatre there. Actually it has 2400 seats? A. The Roxy Theatre—is that the theatre, now, right near the big department store?

Q. It is in Atlanta. That is all I know about it. A. It is right between the hotel and that big department store. I know the theatre very well. As a matter of fact, a friend of mine owns the property. His name is Bob Meyers, and a big hotel operator. He came to me and asked me to help him and advise him after Lucas and Jenkins dropped the

William J. Kupper—By Defendant—Cross

theatre, and I helped him, and I sold him pictures, and then he decided to lease it back to Lucas and Jenkins, who had the lease originally, and I helped out and advised him and got him pictures, gave him some of our pictures, even though they were contracts.

Q. You advised him to lease it back to Lucas and Jenkins?

A. No. I told him if he could get a good lease—he is not a theatre operator; he is a hotel operator. It is the only theatre, the only one, he ever had any interest in. He asked me for my advice, and he said he couldn't get the theatre leased. I said, "Run the theatre." I like to see competi-

(1638)
tion in those towns—any towns. I told him to go ahead and run it, "and I am sure you can get pictures. You may not possibly get all the best," but I got him some pictures.

Q. What were the pictures that you got him? A. Those that Lucas and Jenkins didn't run, or behind that. They weren't our top grade pictures, by any means.

Q. You got him pictures that the other first-run houses didn't want there? A. I gave him pictures, yes; those that were available, that they didn't use, I sold them to him quick.

Q. And not only that they did not use but that they did not want? A. All right, that they did not want, yes.

Q. And I take it those pictures of that quality were not enough to make his operation there a success? A. I don't know about that. He ran it until the time Lucas and Jenkins re-leased it at a great, substantial, increase in rent. I understand that he is now out of the theatre business again.

Q. You know he ran it unsuccessfully? A. No, I don't. I think he was doing pretty well. I think he was getting by all right, from what he told me.

Q. You knew that he could not get the quality of pictures for that theatre from you or any other major dis-

William J. Kupper—By Defendant—Cross

tributor? A. He wasn't going to get mine—I beg your (1689)

pardon.

Q. Let me finish the question. A. All right, pardon me.

Q. You knew, as a matter of fact, that he could not get from you or any other major distributor the quality of pictures that he had to have to let him compete on an equal basis with Paramount? A. I did not know what he could get from any other distributor. I told him personally myself that he was not going to get ours, because I was going to continue selling the Fox theatre. What he could do with somebody else, I didn't know.

Q. What do you do, Mr. Kupper, when somebody wants to put a new theatre in, or does put a new theatre in one of these so-called established account situations? A. Well, sell him some run, if he wants to buy my product.

Q. "Some run"? A. Yes.

Q. That is, last run in the area, behind everybody else who is what you call established? A. Could be. If I have customers that take care of all the other runs, could be the last run.

Q. How about if he becomes affiliated, then what do you do? A. I think we would take it on the same basis.

Q. Do you recall, do you know the situation, in Englewood, California? A. I know we have a couple of theatres out there.

Q. One of them you acquired in 1941, didn't you? A. I (1690)

don't know the exact date.

Q. Fifth Avenue? A. I think so. Somewhere around that time. I know we acquired some theatre.

Q. When it was first built, the operator of that theatre tried to get a first-run in that area from you and you would not even negotiate with him, isn't that right? A. I don't remember. Didn't negotiate with me direct. May have tried

William J. Kupper—By Defendant—Cross

to negotiate with some representative of our company. I don't recall.

Q. You know you didn't make any Fox films available to him for first-run in that area at the time he first completed it? A. I don't think so.

Q. And then after he sold the theatre, or an interest in it, to Fox, then you made films available to him first-run there and for a move-over from the Fox first-run in that area, isn't that right? A. I believe we did.
(1691)

Q. When you talk about selecting customers and dealing the same way with affiliated houses that you do with independents, you don't mean that you make any of these deals blindfolded, do you? A. Blindfolded?

Q. You know who you are dealing with in each case and what his connections are, isn't that right? A. I should think we should.

Q. Part of your business to know that? A. Should know, yes.

Q. And who he is makes a great deal of difference in what you do, doesn't it? A. Sometimes I would say so, yes.

Q. And that may sometimes be a far more important factor than the physical characteristics of the theatre or theatres that he happens to be operating? A. I don't know about that.

Q. You know that is a fact, don't you? A. I don't think it is a fact. It might be.

Q. You remember what happened in Janesville, Wisconsin? A. In Zanesville?

Q. In Janesville. A. I think we had some theatres there and then lost them or they were taken over, but I don't remember.

Q. You had an account there that had the two largest theatres in the town, and then another theatre became affiliated with Fox, Fox had a 40 per cent interest and did the

William J. Kupper—By Defendant—Redirect

(1692) •

booking for it, do you remember? A. I don't remember it. If they had an interest in it, I would say we sold it.

Q. Yes. A. As long as we had to retain an interest or acquire an interest in a theatre, I should think we would sell our product there.

Q. You know that after Fox acquired a 40 per cent interest in the smaller and inferior house, then you sold that house, didn't you? A. If that is the case, we did.

Q. And continued to sell it? A. I think that is the case. I am not positive.

Q. And then finally Fox was able to buy the other two houses and you have what is called a closed town there? A. I believe it is. I believe we have all the theatres there.

Redirect Examination by Mr. Caskey:

Q. Mr. Kupper, in Boston, it appears from your testimony that approximately one-third of the product you sold to RKO and two-thirds you sold to M. & P. Who determined the division or proportion of one-third and two-thirds? A. We did.

Q. And in Albany there is a division of, I understand, two-thirds to Fabian and one-third to Warner? A. That is right.

Q. Who determined that proportion? A. We did.

Q. Calling your attention to Youngstown, Ohio, Mr. Wright asked a question whether you sold to the pool in (1693) •

Youngstown. There is a pool, as you understand it? A. Yes, between Shea and Warners.

Q. Who do you consider your customer? A. Shea.

Q. Do you sell to the pool? A. We sell Ed Grainger, who is head of the circuit there. We sell direct to him. We don't sell any pool.

William J. Kupper—By Defendant—Redirect

Q. In each of these situations in which there is a pool prior to the arrangement between the exhibitors, you had an established customer? A. Yes, sir.

Q. And the customer made some arrangement in the community with other operators whereby your pictures were played in better theatres? A. That is true.

Q. That is true in Jersey City? A. It is true in most all of them. Even in Youngstown, which we just got out of, the Warner theatre is a better theatre than the Park.

Q. Why doesn't Shea have a move-over theatre in Pittsburgh? A. Well, I don't know why. He has none available as far as I can say.

Q. Do you grant Mr. Harris the privilege of a move-over and not the Shea interest? A. No, sir. If Shea had a house that you could move over into, we certainly would let him have it, too. He just doesn't have the theatre.

Q. And one of the requirements of a move-over is that it shall charge the same admission price as the house from (1694)

which it is moved? A. That is correct.

Q. And there is a limit in every community as to how long a picture can play at the advanced admission price? A. I think that is pretty well established.

Q. Today and for some years you have been selling your pictures in small blocks? A. Yes.

Q. And at the time that they are sold to the second and subsequent runs, have they been trade shown? A. Yes.

Q. And who the first-run account in the city is is well known in the trade? A. Yes, sir.

Q. And the number of theatres he has is well known? A. Well known and well established fact.

Q. So that when you sell second-run in Boston, the exhibitor knows in fact, first of all, that only the best pictures are going to be moved over? A. He knows that.

William J. Kupper—By Defendant—Redirect

Q. And, second, he knows that, in fact, the only place they are going to be moved over from is from the Metropolitan to the Paramount and Tenway? A. He knows that.

Q. And at most the number of pictures that could be played on any theory of a violation of second-run contract would be two or three? A. That is right—with those that are moved over, if that is what you mean.

Q. Yes. Without making excuses, it is a fact that a great many of the records and reports and forms of the company have not been kept in precise and apple-pie order (1695)

during the last few years? A. Definitely. The help situation has been terrible. And they come in and walk out on you. It is an awful problem, help today. You have a lot of inexperienced help. And we have lost a lot of good help who went into the services. We are behind, way behind, in a lot of our things, in regular ordinary things that we have had to let slide behind to take care of the more important things.

Q. Has any exhibitor in this country complained to you about the fact that the prior run affiliated theatres during the 1943-44 and 1944-45 seasons were charging too low an admission price? A. No, sir.

Q. Has any exhibitor who has followed one of these affiliated exhibitors, where the contract was not filled out with the admission price, been prejudiced or injured by the omission, say, to fill out the contract?

Mr. Wright: If the Court please, that is a legal conclusion that this man cannot possibly draw.

Judge Hand: Overruled.

A. I don't know of any.

Q. No one has complained? A. Not to me.

Mr. Caskey: I believe that is all.

*William J. Kupper—By Defendant—Redirect**By Mr. Proskauer:*

Q. Just a question or two. You referred to the time in the middle '30s when you had a break with the Warners. (1696)

Do you remember that? A. Yes, I do.

Q. You did not sell them any pictures for two years approximately, wasn't it? A. I think something like that. Sometimes we did not sell them at all.

Q. Then you sold your pictures to other people? A. Yes, sir.

Q. And after about two years you began to sell your pictures to Warners again? A. Yes, sir.

Q. Is it a fact that after you resumed relations with Warners you continued relations with some of the people to whom you had—with whom you had made new relations after that break and, in some instances, you returned to your relations with Warner Bros.? A. I know there were a great many we retained our relationship with.

Q. With the new people? A. The new ones that we had established, and we even do today.

Q. And in some cases you resumed the old relationship with Warners? A. There may have been—yes, we did.

Q. So you determined that question on the basis of what was more advantageous to you? A. That is right.

Mr. Caskey: If the Court please, there are two specific situations which were called to Mr. Kupper's attention, that I am unfamiliar with. If overnight I find anything that should be inquired about, I will ask (1697)

Mr. Kupper to come back, but with that reservation I am through with him.

Now, Mr. Wright, I have in court Mr. A. W. Smith, Jr. Will you stand up, Mr. Smith? And I will

Colloquy

either call him, or, if you prefer, stipulate that if called, that he would answer the same questions which have been propounded to Mr. Zukor and Mr. Skouras in the negative.

Mr. Wright: So stipulated.

Judge Bright: Who is Mr. A. W. Smith?

Mr. Caskey: Maybe I had better ask him that question, at any rate.

Judge Hand: Can't you state that?

Mr. Caskey: Yes. Mr. Smith is Eastern sales manager of Twentieth Century-Fox and has jurisdiction over the exchanges in the Eastern part of the country. Is there anything else you would like to ask him?

Judge Bright: What does that mean, Eastern part of the country?

Mr. A. W. Smith, Jr.: I have charge of sales in the following territories: New York, Washington, Philadelphia, Pittsburgh, New Haven, Boston, Albany and Buffalo.

Mr. Caskey: Anything else?

Judge Bright: I just wanted to know who he was.

Mr. Caskey: Mr. Connors—

(1698)

Judge Bright: Has that stipulation been made?

Mr. Caskey: The stipulation was made, with respect to Mr. Smith?

Mr. Wright: Oh, yes.

Mr. Caskey: Then Mr. Connors, the vice-president in charge of distribution, member of the executive board, and a director of Twentieth Century-Fox. May we have the same stipulation, Mr. Wright?

Mr. Wright: All right.

Mr. Caskey: Are there any questions the Court would like to ask him? He is here for that purpose.

Colloquy

I will have some more in the morning. This happens to be a convenient place to stop.

Judge Hand: You have what?

Mr. Caskey: I will have at least two witnesses tomorrow morning and I have several stipulations.

Judge Hand: We will adjourn until tomorrow morning at ten-thirty.

(Adjourned until Wednesday, October 31, 1945,
at 10:30 a.m.)

Colloquy

(1699)

New York, October 31, 1945;
10:30 o'clock a.m.

Trial resumed.

Mr. Caskey: If your Honors please, Mr. Wright's associates have called my attention to page 1592 of the stenographic minutes, and we have agreed that the 14th line from the top should read—I shall read the whole paragraph—"By the way, we have sold a few pictures to Loew's when we had—not Loew's; I mean we didn't sell Loew's; we sold some, because we couldn't get together with Mr. Richards, with his buyer, Mr. Gaston Dureau."

Judge Hand: Wait a minute. "to, I think, his competitor" goes out?

Mr. Caskey: Yes, and the words "with his buyer" in their place.

And then the word "They" in the next line should be "Loew's." "Loew's played the picture at advanced admission."

And on page 1645, at the third line from the bottom, the answer should read, "They have a percentage the same as we have nationally for the branch.

I offer in evidence Exhibit F-5 for identification.

(1700)

Mr. Wright: No objection.

(Defendant Twentieth Century-Fox's Exhibit F-5 for identification received in evidence.)

Mr. Caskey: Referring to the testimony regarding the Capitol Theatre in New London, Connecticut, about which Mr. Kupper was examined, I wish to call the Court's attention that in evidence and on the same schedule that Mr. Wright read from appears the fact

Stipulation as to Testimony of Joseph M. Schenck

that the Capitol Theatre charged an actual admission price exclusive of tax of 45 cents first-run in New London when exhibiting Bombers Moon, Heaven Can Wait, Holy Matrimony and Sweet Rosie O'Grady.

Mr. Wright, I hand you a form of contract which is used by Twentieth Century-Fox currently after the first block of pictures has been sold to the exhibitor.

Mr. Wright: That is the one gotten up by salesman Sanders? Won't you have it marked?

Mr. Caskey: I will offer it.

(Marked Defendant Twentieth Century-Fox's Exhibit F-14.)

Mr. Caskey: Plaintiff's counsel and we have stipulated as to the testimony of Mr. Joseph M. Schenck; and I hand the stipulation to the reporter and ask that it be copied into the stenographic minutes.

(1701)

(The stipulation referred to is as follows:)

"It is hereby stipulated between the attorneys for the plaintiff and the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that, if called, Joseph M. Schenck would testify as follows:

"Q. What is your name and address? A. Joseph M. Schenck. I reside at No. 720 North Foothill Drive, Beverly Hills, California.

"Q. What is your occupation? A. I am an executive in the production department of Twentieth Century-Fox Film Corporation.

"Q. How long have you been engaged in producing motion pictures? A. Since 1916.

"Q. When did you first have any connection with Twentieth Century-Fox Film Corporation? A. In

Stipulation as to Testimony of Joseph M. Schenck

1935. I was one of the three stockholders of Twentieth Century Pictures, Inc. which was producing motion pictures and releasing them through United Artists Corporation, of which I was also president. In August, 1935, Twentieth Century Pictures, Inc. sold all its assets to Fox Film Corporation, which changed its name to Twentieth Century-Fox Film Corporation. Mr. Darryl Zanuck, Mr. William Goetz and I received stock in exchange, and we entered into employment contracts, agreeing to supervise the production of motion pictures for the company. Shortly thereafter, I

(1702)

became Chairman of the Board of Directors. I am no longer an officer, nor a director of the company and I have sold all of my stock. I am, however, still an executive in the Studio.

"Q. How long ago was United Artists Theatre Circuit formed? A. To my best recollection 1926.

"Q. That was shortly after you became president of United Artists Corporation, the distributor? A. I think a couple of years after that.

"Q. Who else was active with you in forming the United Artists Theatre Circuit, if anyone? A. Sidney Grauman, Lee Shubert, William Phillips, Mary Pickford, Douglas Fairbanks.

"Q. And you were the principal stockholder after it was formed, were you not? A. When it was first formed I think that Pickford and Fairbanks jointly had as much stock as I had and Sidney Grauman had as much as I did.

"Q. You owned a third approximately? A. No, less than a third. I think I owned one-fifth of that stock. But subsequently I bought Grauman out.

"Q. And when was that? A. Grauman had 80,000 shares and I think I had 80,000 shares and I bought him out because he got cold feet.

Stipulation as to Testimony of Joseph M. Schenck

(1703) "Q. That was about when? A. He never operated—he was to operate the theatres, but he didn't wait that long.

"Q. This was right after the corporation was organized? A. Right. His chief reason was that he didn't want to leave California. He liked California too much.

"Q. What was the purpose of organizing the United Artists Theatres Circuit at that time? A. At that time there were but very few theatres in the United States that ran a picture longer than one week.

"Q. This was in 1926? A. 1926 I think, and if there were theatres there were so many pictures made by other companies that were also desirous of running their pictures longer than a week in a theatre that we did not get in often enough to those theatres that would run a picture more than a week.

"Q. When you say 'we' you are referring to the United Artists pictures? A. I mean the United Artists pictures, and we felt that we needed theatres that would be ready and willing to run our pictures for an indefinite period or at least as long as the public would patronize them in a paying mass, you might say. And we decided that we would build first-run theatres of a certain capacity, that capacity being between 1500 and 2000 seats, where we could run a picture or where we could exhibit a picture for a long run.

(1704)

"Q. How did you fix on that particular capacity of 1500 to 2000 as desirable for your purposes? A. Well, there was sort of an inclination at that time on the part of every exhibitor to have theatres of very large capacity, such as four or five thousand seats. In a theatre of that kind no picture could run more than

Stipulation as to Testimony of Joseph M. Schenck

a week. You couldn't expect it. And their picture was exhibited with either vaudeville acts or stage show and we wanted our pictures to play without a stage show and without vaudeville acts and play in a theatre of such capacity that would permit a run of a picture for a long period of time, for a sort of a show window in many big cities for our product and to get a cumulative advertising and importance through the picture being a long-run picture.

"Q. Well, was it just from the standpoint of advertising value that you thought a long run in a smaller house was more desirable than a short run in a larger one, or was it a question of increased revenue? A. Increased revenue also because if a theatre runs a vaudeville show or a stage show with a picture a great deal of the receipts taken in at the box office go to pay for that stage show or vaudeville show of which we couldn't expect to get a percentage.

"Q. And after United Artists Theatres Circuit was organized it proceeded to acquire theatres of the type
(1705)

you have just described? A. Yes, sir.

"Q. About how many? Do you remember? A. 15 theatres.

"Q. Do you remember where they were located?

A. Located in Los Angeles, San Francisco, Detroit, Chicago, Baltimore, Columbus, Portland, Seattle, Pittsburgh, Louisville, New York. That is about all I can remember.

"Q. Well, there was only one in each town that you went into though? A. Well, some towns we had more than one because we took a 50 per cent interest with another company in some of the towns.

"Q. And which towns were those? A. Like Baltimore and Columbus.

Stipulation as to Testimony of Joseph M. Schenck

"Q. And whom did you take the interest with?

A. With Loew Company.

"Q. And were there any other situations in which you were jointly interested with Loew? A. In New York, two theatres—the Rivoli and the Rialto—with the Paramount Company.

"Q. And these theatres that you acquired in the other towns were all named the United Artists Theatre in each case? A. In most cases they were named United Artists Theatres.

"Q. After they were acquired they then entered into long term franchises with United Artists Cor-
(1706)

poration? A. Yes, sir, ten-year franchise. That wasn't after but before we organized we made that or simultaneously with the organization of that theatre company we got that ten-year franchise because that franchise helped us to finance the acquisition of the theatres.

"Q. And this franchise gave the United Artists Theatres the exclusive right to the first-run exhibition of the United Artists pictures in the towns where they were located? A. Well, all of the producers of United Artists pictures with the exception of Charlie Chaplin, who did not subscribe to it.

"Q. Do you know what Mr. Chaplin's reasons were for not subscribing? A. I invited Chaplin to take an interest in the United Artists Theatres and he didn't want to do it. And I also wanted him—asked him to join that franchise and he refused to do that and I couldn't possibly give you his reasons for it because he didn't know them himself.

"Q. Can you give us the conversation you had with him as best you can remember on that subject?

A. Charlie refused to sign any papers. He was per-

Stipulation as to Testimony of Joseph M. Schenck

fectly willing to subscribe to it without putting his name on paper.

"Q. Well, he didn't say anything at the time in reference to why he would not put his name on paper?

A. He signed a couple of contracts years prior to that and they did not turn out quite as good as he wanted
(1707)

them to turn out. In fact, he had them changed in the middle of the contract—improved them—and he made up his mind he never would sign any papers.

"Q. Wasn't there any discussion with him as to the desirability of United Artists producers entering the exhibition field? A. Oh, he approved of the plan. The plan was perfectly all right for everybody else but himself because he didn't want to commit himself to the future. At the time he thought it was all right, but he didn't know how it would turn out in the future, what changes would come about in the industry, and he didn't want to be committed to any permanent plan.

"Q. Are these franchises or the one franchise which controlled all of the situations, was that for a ten-year period? A. Yes, sir.

"Q. Did the United Artists Theatres Corporation execute a series of franchises with the United Artists Corporation or was there one franchise which covered all of the United Artists Theatres? A. One franchise.

"Q. There was a separate franchise executed with the United Artists Theatre in Chicago, wasn't there?

A. No, there was no separate franchise.

"Q. You still have the same interest in the United Artists Theatres Circuit, now? A. Yes, sir.

"Q. And what if any changes have there been in
(1708)

the theatre holdings of the Circuit since that time?
A. We expanded the Circuit.

Stipulation as to Testimony of Joseph M. Schenck

"Q. In what way? A. By building a number of theatres in the State of California and by acquisition of a number of theatres in New York, Brooklyn, Long Island, and Jersey.

"Q. And when did this expansion and acquisition that you have referred to occur? A. We built the theatres in California I think in 1932 or 1933.

"Q. What part of California was that? A. In Northern and Southern California.

"Q. Do you remember the names of the cities? A. Los Angeles, San Francisco, Sacramento, Inglewood, Beverly Hills.

"Q. Were those first-run theatres? A. No, sir.

"Q. And these theatres you have referred to in Brooklyn and New York and that territory, when were they acquired? A. They were acquired in 1935, I think.

"Q. They were theatres which had formerly been part of the Fox Metropolitan Theatres Corporation? A. Yes, sir.

"Q. And were acquired on a sale of the assets in the Fox Metropolitan bankruptcy proceeding? A. I know that we have acquired them through a plan that was submitted to Judge Mack in one of these courts here and subsequently that plan was approved.

"Q. And the court you are referring to was the
(1709) court that had the Fox Metropolitan receivership or bankruptcy, was it not? A. I think so.

"Q. Now, these were also subsequent-run theatres, were they not? A. Yes, sir.

"Q. What was the purpose of acquiring the subsequent-run theatres you have referred to? A. Originally our purpose in the acquisition of theatres was entirely different, as I recited. But then we had money

Stipulation as to Testimony of Joseph M. Schenck

idle and we wanted to expand purely for the purpose of making money.

"Q. Whom do you refer to as 'we'? A. I mean the United Artists Theatre Circuit, Inc.

"Q. And the subsequent-run theatres that you acquired did not enter into any franchise arrangements with the United Artists Corporation? A. No, sir. The franchise for the United Artists pictures had expired about that time and has not been renewed.

"Q. Well, the franchise was made for ten years in 1926 and would have expired in 1936, and these acquisitions that you have referred to according to your testimony occurred before 1936? A. That franchise did not cover anything else but first-run theatres.

"Q. Yes. Are your associates in the ownership of the United Artists Theatre Circuit the same today as the ones you previously mentioned? A. I think there is a slight change in the stockholders. Gloria Swanson

(1710)

does not own stock. Miss Pickford is still a stockholder. Goldwyn is still a stockholder. I am a stockholder. Bill Phillips is still a stockholder.

"Q. Do any of the defendants in this suit have a financial interest in the United Artists Theatre Circuit today? A. No, sir.

"Q. What is the relationship between United Artists Theatre Circuit, Inc. and Metropolitan Playhouses? A. The United Artists Theatre Circuit, Inc. owns 50 per cent of the Metropolitan Playhouses, Inc.

"Q. What other corporations does United Artists Theatre Circuit, Inc. have an interest in? A. In the Robb & Rowley Circuit of theatres we have a 50 per cent interest.

"Q. Do you have any financial interest in any other motion picture enterprises besides Twentieth

Stipulation as to Testimony of Joseph M. Schenck

Century-Fox Film and United Artists Theatre Circuit, Inc. A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to restrain competition in the production, distribution and exhibition of motion pictures in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competi-

(1711)

tive terms? A. No.

"Q. Has there been any agreement or understanding to your knowledge to withhold any of the production personnel and equipment from any producer of motion pictures? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independent producers from access to production personnel and to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants in this case? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement among the defendants or any of them to license any pictures for exhibition in any theatre before the pictures have been produced and before any exhibitor has had a fair opportunity to estimate

Stipulation as to Testimony of Joseph M. Schenck

the value and character of the films licensed and before such films have been completed or tradeshow?

A. No.

(1712) "Q. Has there been or is there to your knowledge any agreement or understanding among the defend-

ants or any of them to condition the licensing of one or more films or group of films upon the licensing of another film or group of films? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of film in one theatre or group of theatres upon the licensing of film in another theatre or group of theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of the circuit? A. No.

(1713) "Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them in licensing their pictures to favor the theatres in which the defendants or any of them had an interest against the theatres of exhibitors not affiliated with any producer-exhibitor with respect to

Stipulation as to Testimony of Joseph M. Schenck

run, clearance, license fees or any other terms of licensing? A. No, sir.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any two or more of them to license pictures for exhibition in the theatres in which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures distributed by the other? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independently produced motion pictures from theatres in which the defendants or any of them had an interest? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from the operation of competing first-run theatres in cities and towns where theatres affiliated with defendants or any of them are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities

(1714)

and towns where affiliated theatres are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to use the first and early run affiliated theatres to control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in the cities and towns where affiliated theatres are located, or elsewhere? A. No.

Stipulation as to Testimony of Joseph M. Schenck

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them as to the terms upon which each or any of them would license their film to unaffiliated exhibitors? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to deprive any theatre operator of the supply of film or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations? A. No.

(1715)

"Q. Has there been or is there to your knowledge an agreement or understanding among the defendants or any of them not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into joint agreements with respect to a theatre whereby the film buying control or proceeds from the operation thereof is divided between two or more exhibitor defendants for the purpose of restraining competition unreasonably or monopolizing exhibition or distribution with respect to such theatre? A. No.

Stipulation as to Testimony of Joseph M. Schenck

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or any city or town thereof? A. No."

(1716)

Judge Bright: Mr. Caskey, yesterday, you offered some forms of licenses, I think, that covered up to and including the 1933-1934 season?

Mr. Caskey: Yes, sir.

Judge Bright: Was the form of license from then on the same until the current license?

Mr. Caskey: No, sir.- The form of license from the 1933-1934 season through the 1940-41 season was substantially the same. I make the reservation that there may have been changes of phraseology or grammar; but the form and the method of selling was the same. And then a new contract form was prepared for the 1941-1942 season, which is the first year of selling under the consent decree.

Judge Bright: Do we have that form?

Mr. Caskey: You have an excerpt—we have it here.

Mr. Wright: We put in evidence, if the Court please, the 1936-1937 form and the 1943-1944 form.

Mr. Caskey: That is right. Is that in evidence?

Mr. Wright: Yes.

Judge Bright: That is in your appendix.

Colloquy

Mr. Wright: The licenses themselves are in evidence—

(1717) Mr. Caskey: The 1943-1944 one is in evidence.

There are a great many of them in evidence.

Mr. Wright: 1936-1937 is also in evidence.

Mr. Caskey: Sir?

Mr. Wright: 1936-1937 is also in evidence.

Mr. Caskey: That is right. And there is no change from 1941-1942 to 1943-1944.

Judge Bright: The reason why I asked the question was that in comparing in this appendix of the Government, in comparing your form for 1936-1937 and 1943-1944, there does not seem to be any provision in the 1943-1944 with reference to what will be done if an exhibitor reduces his admission. That is so far as this printed book is concerned.

Mr. Caskey: Suppose I get a copy for all the years and submit them at some convenient time. My recollection is that there is a penalty clause. My recollection is if he reduces the admission price he may be required to pay based upon a percentage of the agreed admission price; and he is subject to termination of the contract, and his clearance may be reduced.

Judge Bright: Well, I do not recall seeing that in this printed book in the 1943-1944 abstract.

Mr. Wright: My recollection corresponds with Mr. Caskey's. It may be that the summary in the appendix does not reflect it, but the agreement itself is in evi-

(1718) dence as Exhibit 276, which is the 1943-1944 form, and No. 275 is the 1936-1937.

Judge Bright: We haven't had access so far to those forms. I was just reading out of your appendix.

Colloquy

Mr. Wright: Yes. It is possible our appendix was at fault in that respect, in not pointing out the provision of the agreement.

Judge Bright: I went over it hurriedly, when we were discussing admission prices during the taking of testimony, and I may have skipped it, but I did not see it.

Mr. Caskey: I am reading now from the 1943-1944 contract, which is Exhibit 276:

"The Exhibitor during the whole of the licensed exhibition period of the licensed pictures hereunder shall charge for admission per person to said theatre the following prices:

·EVENINGS: Adults, Orchestra .. Balcony ..; Children, Orchestra .. Balcony ..

·MATINEES: Adults, Orchestra .. Balcony ..; Children, Orchestra .. Balcony ..

"If during any such period less than said admission prices is charged, the Distributor in addition to all other rights hereunder shall have the right: (a) to terminate the license of the picture then being exhibited, by written notice to such effect to the Exhibitor and upon the giving of such notice, the license of such picture shall forthwith terminate and revert

(1719)

to the Distributor; or (b) provided the Exhibitor is granted herein a period of 'clearance' to reduce such period by not to exceed one-half in respect to each of the licensed pictures thereafter deliverable hereunder; or (c) provided no period of clearance is specified in the Schedule to withhold, for a period not to exceed sixty (60) days notice of the date when each picture thereafter deliverable hereunder will be available for exhibition by the Exhibitor; and as to each such picture the 'run' thereof, if any, granted the Exhibitor,

Colloquy

shall be deemed revoked and the Exhibitor agrees to exhibit each such picture after notice of the available date thereof upon the date or dates determined as provided in paragraph 7 hereof; if Distributor does not elect to terminate the license of the picture then being exhibited, as provided in subdivision (a) of this paragraph, the Exhibitor shall account for all admissions to said theatre during the exhibition of such picture on the basis of the admission prices hereinabove stipulated."

Judge Bright: That is on the face of it?

Mr. Caskey: Yes, sir.

Mr. Wright: If the Court please, you will note that those provisions he was reading are substantially the same as those set forth on page 52, at the end of the schedule, in the 1936-37 agreement. Then when we got over to page 60, where we summarized the changes in the schedule in the 1943-44 agreement, we simply noted the changes that were made and then

(1720)

we set up in the bottom, "Schedule is otherwise substantially the same except for substitution of the Consent Decree arbitration procedure." So I think the Appendix does correctly reflect the situation.

Judge Goddard: What does Mr. Schenck's testimony relate to?

Mr. Caskey: Mr. Schenck's testimony primarily relates to the reasons for United Artists Theatre Circuit, Inc.—

Judge Goddard: The reasons?

Mr. Caskey: The reasons why United Artists Theatre Circuit, Inc. built a number of medium sized theatres in various of the principal cities of the United States for the exhibition of United Artists pictures

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on long runs, or released on longer runs than were then current in the industry. It gives the story of the ownership of United Artists Theatres Circuit, Inc., and as we believe, shows that it is not affiliated with Twentieth Century-Fox. It also details briefly the reasons why United Artists Theatres Circuit, Inc. acquired an interest in the reorganized Metropolitan Playhouses, which was in receivership in this court under Judge Mack's supervision. The reason given is that it was purely an investment.

I have here an affidavit of Felix A. Jenkins, the secretary of Twentieth Century-Fox, which Mr.

(1721)

Wright has agreed may be taken as testimony, and I will hand that to the reporter and ask that it be copied in the stenographic minutes as testimony and not as an affidavit.

Judge Goddard: What is his name and what is his official position?

Mr. Caskey: Felix A. Jenkins. He is the secretary and a director of the corporation.

Judge Goddard: Of Fox?

Mr. Caskey: Yes, sir. This has to do with the history of the company, the ownership of its stock, and it deals with its financial vicissitudes in the late '20s and early '30s, and it details the transactions in 1935 when the company purchased the assets of Twentieth Century Pictures and secured the services of Mr. Zanuck as the head of its production.

(The affidavit referred to is as follows:)

"State of New York, }
County of New York, } ss.:

"I, Felix A. Jenkins, being duly sworn, do depose and say:

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"I am Secretary and a director of Twentieth Century-Fox Film Corporation. The corporation was organized under the laws of New York on February 1, 1915. Its original capital was \$1,500,000, divided into 100,000 shares of \$10 par value common stock and 5,000 shares of \$100 par value preferred stock.

(1722)

Immediately upon its organization, Fox Film Corporation acquired the assets of Box Office Attraction Film Rental, Inc. and the stock of William Fox Vaudeville Company and the stock of Wonderful Play and Players Company, Inc. The first Board of Directors comprised John C. Eisele and Nathaniel King, both of the Newark investment firm of Eisele & King, Anthony R. Kuser, Thomas N. McCarter, William Fox, Charles S. Levin, Jacob G. Leo (Fox's brother-in-law) and Saul E. Rogers. Winfield Sheehan was general manager. This group managed the corporation until April 7, 1930.

"By June 17, 1919, the preferred stock of the corporation had been retired by redemption. On December 30, 1921, the board of directors approved the acquisition of a first run theatre in Oakland at an investment of between \$250,000 and \$300,000, and negotiations for the acquisition of a first run theatre in Philadelphia were discussed. These negotiations were unsuccessful and in 1924 a subsidiary commenced the erection of the Fox theatre and office building at Fifteenth and Market Streets in Philadelphia. On July 17, 1924, the directors authorized the acquisition of three theatres in Chicago from Ascher.

"On May 28, 1925, the capital stock was increased to 1,000,000 shares without par value and reclassified into 100,000 shares of class B common stock and

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(1723)

900,000 shares of class A common stock. The class B common stock was given the sole right to vote except as otherwise might be provided by law. The previously outstanding 100,000 shares of common stock were surrendered in exchange for the 100,000 shares of new class B common stock.

"400,000 shares of the new A stock were listed. 235,000 shares were issued as a stock dividend and 165,000 shares were offered to stockholders at \$43 a share, Eisele & King agreeing to purchase any shares not subscribed for by stockholders.

"On September 15, 1925, an agreement was approved with Adolph Ramish Inc. and Adolph Ramish for the purchase of 47,000 shares of West Coast Theatres, Inc., and an additional 6,000 shares at the price of \$55 a share.

"On December 1, 1925, the acquisition of the preferred stock of Ascher Theatre Circuit for \$500,000 was approved. The circuit embraced 19 theatres in Chicago and suburbs. The remaining stockholders of West Coast Theatres, Inc. formed a voting trust and transferred their stock to Wesco Corporation, in exchange for its voting trust certificates thus insuring that Fox Film Corporation could not buy control of West Coast Theatres, Inc.

"On March 5, 1928, all the stock of Wesco Corporation was acquired; 107,029 were purchased at \$55

(1724)

per share, and 187,902 in exchange for 140,926½ shares of Fox Film's A stock. In addition, 1,620 shares were variously acquired bringing Fox's total interest to 100%. Fox Film then donated to Wesco its holding of 88,270 shares of the stock of West Coast Theatres, Inc. at the book value of \$4,229,814.61 and Fox

Colloquy

Film's investment in Wesco Corporation was fixed at \$20,570,267.97.

"In January and February, 1930, the financial affairs of the company were so precarious that a number of actions had been instituted for the appointment of a receiver. Various plans were negotiated for the refinancing of the company and there was much litigation. On April 7, 1930, William Fox sold all of the class B common stock to General Theatres Equipment, Inc. and a new management took over the affairs of the company headed by Harley L. Clarke, who became president.

"By certificate filed with the Secretary of State on April 17, 1930, the previously authorized 1,000,000 shares without par value were increased to 5,000,000 shares and reclassified as 100,000 shares of class B common stock and 4,900,000 shares of class A common stock. The certificate was pursuant to action taken on October 10, 1929, but the certificate was withheld from filing because the company could not at the time afford the payment of the large fee involved. It was filed April 17, 1930, which was the effective date of

(1725)

the refinancing that resulted from the retirement of William Fox from the company by the sale of his stock to General Theatres Equipment, Inc. on April 7, 1930.

"A part of the refinancing of this company in 1930 consisted in the issue of \$55,000,000 of one-year notes. The bankers who had purchased them insisted upon their payment and additional financing was necessary. This consisted of the issuance of \$30,000,000 of 6% convertible gold debentures and the sale of certain securities to a corporation known as Film Securities Corporation for a stated consideration of

Colloquy

\$75,000,000, of which \$28,000,000 was in cash and the balance in its class A common stock. The proceeds of these two transactions paid the \$55,000,000 of one-year notes.

"In the fall of 1931, a new management was installed. Charles E. Richardson became treasurer of the corporation and on November 17, 1931, Edward R. Tinker, a former president of The Chase National Bank of the City of New York, became president.

"On March 22, 1932, Mr. Samuel Burns, the secretary and a vice-president, resigned. On April 1, 1932, Sidney R. Kent became executive vice-president in charge of operations. He later that year became president on Mr. Tinker's resignation.

(1726)

"On May 5, 1932, the capital of the corporation was reduced from \$90,780,000 to \$12,628,300, which was \$5 per share multiplied by the 2,525,660 shares of stock outstanding. The result was the creation of a huge capital surplus against which reserves for depreciation were set up.

"In 1932, the company was adversely affected by a series of receiverships of related companies. On March 1, 1932, Daniel O. Hastings was appointed receiver of General Theatres Equipment, Inc., which at the time was the largest stockholder of the company. On May 18, 1932, a receiver was appointed of Roxy Theatre Corporation which was this company's first run account in New York City. On June 6, 1932, a receiver was appointed of Fox Metropolitan Playhouses, Inc., a company which operated theatres in metropolitan New York and adjacent territory and which played Fox pictures. On June 22, 1932, receivers were appointed of Fox Theatres Corporation. On December 31, 1932, Pacific Northwest Theatres,

Colloquy

Inc., a subsidiary of Wesco Corporation filed a petition in bankruptcy. On February 28, 1933, Fox West Coast Theatres the principal subsidiary of Wesco filed a petition in bankruptcy. About the same time Midwesco Theatres, Inc. and Midwest Theatres, Inc., subsidiaries of Wesco, filed petitions in bankruptcy. (1727)

"In 1933, the financial condition of the company was so precarious that bankruptcy was imminent. The principal subsidiaries of Wesco were already in bankruptcy. In the spring of 1933, the holders of the 6% notes of Film Securities Corporation announced their intention to foreclose which, if consummated, as it was, would wipe out the value of the Class A stock which Fox Film Corporation had, and result in a loss of nearly \$46,000,000. The company had outstanding debentures of \$30,000,000 and bank loans in the amount of \$12,000,000. It had been unable to meet the interest payable April 1, 1933. During May and June a reorganization was worked out. The creditors to the extent of \$36,000,000 agreed to exchange their creditor claims for stock.

"By certificate filed with the Secretary of State on July 22, 1933, the class A stock was reduced by 5/6 or to 404,276-2/3 shares, and the class B common stock was reduced by 5/6 or to 16,650 shares, and the capital of the corporation was reduced to \$2,104,633.33 or \$5 per share for each of the 420,926-2/3 shares.

"Then by certificate filed the same day, the class A common stock was increased to an authorized 2,800,000 shares. The class B common stock remained at 16,650 shares and the capital remained at \$5 per share.

"The principal creditors of the corporation, that (1728)

is, the debenture holders and The Chase National Bank of the City of New York surrendered the obli-

Colloquy

gations of the corporation which they held for shares of class A stock. The increased stock was offered to the stockholders at \$18.90 per share on the basis of 5 shares of new stock for each share then held. To the extent that the same was unsubscribed for by stockholders, the aforementioned creditors exchanged the obligations which they held for such stock at \$18.90 per share. At the same time the investments which the corporation held in Film Securities Corporation and Wesco Corporation (now National Theatres Corporation) were reduced to a nominal book value of \$1 each.

"In 1935, this company acquired the assets of Twentieth Century Pictures, Inc., a producing company owned by Joseph M. Schenck, Darryl F. Zanuck and William E. Goetz, and they entered into long term contracts for their services.

"On August 22, 1935, the class A common stock and class B common stock were eliminated and there were created 4,600,000 shares of new stock without par value of which 1,500,000 shares were preferred stock and 3,100,000 shares were common stock. The 2,800,000 shares of class A common stock previously authorized and the 16,650 shares of class B common stock previously authorized were by this certificate

(1730) transmuted into new preferred stock and the common stock on the basis of $\frac{1}{2}$ share of preferred stock and $\frac{1}{4}$ share of common stock for each share of class A stock issued or unissued and one share of preferred stock and $\frac{1}{2}$ share of class B common stock, issued or unissued. The preferred stock was made convertible into common stock on the basis of $1\frac{1}{4}$ shares of common stock for each share of preferred stock.

"There were issued to the stockholders of Twentieth Century Pictures, Inc., 132,513 shares of pre-

Colloquy

ferred stock and 613,264 $\frac{3}{4}$ shares of common stock which was exactly one-half of the common stock outstanding at the time of the reorganization.

"In 1943, 10,000 shares of prior preferred stock of a par value of \$100 were issued. The proceeds thereof and other funds of the company were used to acquire from The Chase National Bank of the City of New York the 58% of the stock of National Theatres Corporation which it had held since 1934, and National thus became a wholly owned subsidiary.

"In April, 1942, Sidney R. Kent died. Shortly thereafter, Spyros P. Skouras was elected president of the corporation and Wendell L. Willkie, chairman of the board. Mr. Willkie died October 8, 1944.

(1730) "In 1943 and 1944, additions were made to the board of directors to elect the representatives of Massachusetts Investment Trust, a substantial stockholder, and representatives of Lehman Brothers which had underwritten the issuance of the prior preferred stock.

"No officer of Twentieth Century-Fox is an officer, director, or, so far as is known, a stockholder in any of the other defendants. No director of the company is an officer or director, or, so far as is known, a stockholder in any other of the defendants. No stockholder of the company owning any substantial number of shares of the stock of any of the three classes is, so far as is known, an officer, director or stockholder of any of the other defendants.

"To my knowledge, Twentieth Century-Fox has not conspired or combined with the other defendants in this case, or any of them, to restrain or monopolize trade and commerce."

Abraham Montague—By Defendant—Direct

Mr. Caskey: I yield now to Mr. Frohlich.

Judge Bright: Do I understand that the Fox case is now in?

Mr. Caskey: No, sir. We have testimony which we may adduce by stipulation of the comptroller, and we will have at least one witness from the Coast. As to National Theatres Corporation, we are engaged in all the periods when there is a recess in preparing

(1730-A)

stipulations that we are submitting to Mr. Wright, and we are making substantial progress there. I think we will have a stipulation of facts from each of the operating heads of the five principal divisions.

I think that is right, isn't it, Mr. Wright?

Mr. Wright: We have agreed that they would testify in accordance with their affidavits.

(1731)

ABRAHAM MONTAGUE, called as a witness on behalf of defendant Columbia Pictures Corporation, being first duly sworn, testified as follows:

Direct Examination by Mr. Frohlich:

Q. Where do you reside, Mr. Montague? A. New York City.

Q. What is your occupation at the present time? A. General sales manager.

Q. For whom? A. Columbia Pictures Corporation.

Q. How many years have you been engaged in the motion picture industry? A. Since 1908.

Q. Will you kindly give us your background and experience. A. In 1908 I opened a very small theatre in Weare, New Hampshire. I operated that theatre and some other theatres until 1923.

Abraham Montague—By Defendant—Direct

In 1923 I sold out the motion picture interest that I had and became what is known as a state-right distributor in Boston.

In 1929 we sold out the business of state-right distribution to Columbia Pictures Corporation, and since that time I have been associated with them, first as a district manager operating out of Boston, and then as a sales manager operating out of New York.

Q. Can you tell us something of the Columbia Pictures Corporation from the first days that you were acquainted (1732)

with that company? A. My first connection with the company was the purchasing of a picture called Innocents for the territory of, New England, the six states. I undertook the distribution of that picture as a state-righter for Columbia Pictures. After that I continued to purchase state rights for New England from Columbia.

Q. Did you know the officials of Columbia Pictures in those days? A. Well, I got acquainted with them after my first contact with them.

Q. Was it a large company or a small company? A. It would be considered a small company.

Q. How was it selling its pictures? A. In those days it was selling its pictures through state-right operators throughout the United States—in fact, throughout the world.

Q. Was the method of state-right distribution prevalent throughout the motion picture industry in the early 20s? A. Yes; practically all of the pictures were distributed in the early 20s through state-right distribution.

Q. You yourself said you were a state-righter. Did you control certain territory? A. We had the rights of licensing the theatres on these state-right pictures in six states.

Q. Did other people in the state-right field likewise (1733)

operate in various territories throughout the United States?

A. Yes, sir.

Abraham Montague—By Defendant—Direct

Q. So that if a man produces a picture and wanted to sell his picture and had no distribution organization of his own, he was compelled to go to the state-right people, wasn't he? A. Yes, sir.

Q. And he would have to parcel his product out in various territories throughout the country? A. Yes, sir.

Q. From the viewpoint of the producer and from your experience with the producer, was that a profitable operation for the producer? A. Well, to the best of my recollection it was profitable in some instances; unprofitable in others. It was not a certain operation; it was an uncertain operation.

Q. Did there come a time when there was a change in the method of distribution throughout the industry? A. Well, we know of one method of change known as the consent decree, which happened some few years ago.

Q. I am speaking of the early 20s. A. In the early 20s the state-righters would accumulate from one or more producers a program and then go out and try to sell that program in block.

Q. Did a time come when the producing companies—by the way, how many important producing companies were there in existence in the early 20s? A. I would have to refer (1784) to the records on that; I don't remember.

Q. Did a time come when those producers commenced to operate under a system of distribution of their own? A. Yes, sir.

Q. Had nothing to do with state-right? A. Yes, sir.

Q. In that way they contacted the exhibitor directly? A. Yes, sir.

Q. And sold their product to him without the intervention of any state-right? A. Correct.

Q. Did Columbia Pictures embark upon that method of operation? A. Yes, they embarked on what we might call the national distribution system in 1929.

Abraham Montague—By Defendant—Direct

Q. Do you know whether they required and obtained financing for that purpose? A. They did require and obtain financing for that purpose.

Q. A very substantial amount, wasn't it? A. In those days we would call it a substantial amount, yes, sir.

Q. Was it over a millions dollars? A. I believe it was over a million dollars.

Q. That money was required to organize the distribution system throughout the United States, wasn't it? A. It was required to buy out some of the state-righters and acquire a system of their own.

Q. And to substitute for state-right divisions exchange branches of their own? A. Yes, sir.
(1735)

Q. In how many cities of the United States, approximately, has Columbia branch offices? A. 31.

Q. And has had those offices for a great many years? A. Since 1929.

Q. After Columbia organized this distribution department, how did Columbia sell its pictures to the exhibitor? A. They had salesmen go out and made effort to sell the product of one year in a group sale.

Q. Was that known as block booking? A. It could be called block booking, yes, sir.

Q. Is that the same method of operation as Mr. Wright refers to in his complaint as blind selling? A. Yes, I think Mr. Wright refers to it as blind selling.
(1736)

Q. As a matter of fact, the exhibitor knew very well what he was purchasing when he made a contract for your year's product, didn't he? A. He knew fairly accurately what he was purchasing. His principal purchase, we always claimed, was the company he was buying from. He knew the history of that company, the type of releases it had, and that is why, in most cases, he decided to continue to do business.

Abraham Montague—By Defendant—Direct

Q. In selling your pictures in block, didn't you try to describe as adequately as possible the prospective pictures by the title of the picture, by the story, or play, or novel, and by the stars? A. We gave him all the information as accurately as possible that we had.

Q. And then when you went into production you tried to keep pace with that information and live up to it? A. To the best of our effort, sir.

Q. Have you been selling your pictures in that way from the early 20s down to the present time? A. Yes, sir.

Q. Are there other distributors in the United States who sell their pictures in the same manner? A. Yes, sir.

Q. Will you name them, please? A. Universal, Republic, Monogram, Producers.

Q. And from your experience with exhibitors, both as an exhibitor and as a producer, do you find that that method of operation is satisfactory to the exhibitor? A. It is my (1737)

belief it is the most satisfactory method of distribution to the exhibitor. By that means the exhibitor knows that he has a certain program that is his, he knows what price the pictures are coming to him at, and he feels that he is having some insurance as against his investment in brick and mortar, sir. We are quite certain that the majority of the exhibitors in the United States desire to buy that way.

Q. Is that method of operation vital and necessary for Columbia? A. It is absolutely vital and absolutely necessary, sir.

Q. Please state why. A. If we were to change our method of distribution to the so-called small group selling, which is used under the consent decree, we would find it absolutely necessary to change the whole financial base of our company. We wouldn't have—we do not have enough money to keep pictures in inventory, such as we would have to do, for any period of time. We find it absolutely necessary to turn our

Abraham Montague—By Defendant—Direct

pictures over as rapidly as possible, to send that money back to California so California can again invest it in pictures.

Q. Does the making of block contracts or bulk contracts insure a market for your product? A. We feel that it does, sir.

Q. Does it give you something on which you can base the gamble that you take in making pictures? A. It makes (1738)

more certain the gamble, sir.

Judge Hand: How have you managed to get along in those four years of tyranny, or whatever there has been?

The Witness: We have got along very well.

Mr. Fröhlich: We are not a party, your Honor, to the consent decree.

Judge Hand: That is true.

Judge Goddard: How large a block did your client sell?

Q. Tell the Court, please, how large a block of pictures you sell each year, approximately. A. Well, for the last few years it has numbered between 40 and 44 pictures, that we call features; we also sell westerns; we also sell short subjects, and we have serials.

Judge Bright: How many in a block?

The Witness: We try to sell all of the pictures that we have to all exhibitors. It is either all or part thereof.

Judge Goddard: That numbers some 40, you say?

The Witness: So-called features, as we call them, there are between 40 and 44.

(1739)

Judge Bright: During what period?

The Witness: Between the period of September and October 1st we expect to produce and release that number. Sometimes we fall a little short.

Abraham Montague—By Defendant—Direct

By Mr. Frohlich:

Q. In addition to distributing your own pictures, Mr. Montague, has Columbia from time to time distributed pictures of other producers? A. Yes, sr.

Q. Did Columbia at any time lend its distribution facilities or make them available, as such, to other producers? A. We never lend our facilities. We have released pictures for other producers.

Q. That has been by special contract? A. Yes.

Q. No other producer or distributor in this country has any access to your branch office? A. No, sir.

Q. Your salesmen? A. No.

Q. Or your employees? A. No.

Q. You distribute independently? A. Yes, sir.

Q. And you produce independently? A. Yes, sir.

Q. Have you any understanding, any arrangement, any contract with any other defendant in this case other than the occasional exhibition license contract that you have with his theatres? A. No, sir.

Q. I have prepared, Mr. Montague, a list of pictures—that is, a list of the number of pictures produced by outside (1740)

producers and distributed by Columbia from 1928 down to the present time. I show you this list and ask you whether this is a true and accurate list? A. We believe it to be true and accurate, sir.

Q. You had it prepared, as a matter of fact, at my request, under your direction, didn't you? A. Yes, sir.

Mr. Frohlich: I should like to offer that in evidence.

Mr. Wright: No objection.

(Marked Defendant Columbia's Exhibit C-1.)

Judge Goddard: How would you describe that exhibit?

Abraham Montague—By Defendant—Direct

Mr. Frohlich: It is the list of outside producers. May I hand it up to the Court?

Judge Hand: Yes.

(Exhibit C-1 handed to the Court.)

Q. In 1928, Mr. Montague, I see by this document that I am going to show you in a moment Columbia spent all told for this production \$1,632,300. Of course, that amount has increased each year, hasn't it? A. Yes, sir.

Q. And have you at my request prepared from your books of account a list of the total expenditures each season by Columbia Pictures in its production? A. Yes, sir.

Mr. Frohlich: I should like to offer that in evidence.

(1741)

Mr. Wright: We have no objection.

Mr. Seymour: May I see it, Mr. Frohlich?

Mr. Frohlich: I will give you a copy, Mr. Seymour (handing).

(Marked Defendant Columbia's Exhibit C-2.)

Q. There has been some evidence here, Mr. Montague, in this case about borrowing and loaning players, artists, from one company to another. Have you prepared from data collected from the studio of Columbia Pictures—and, by the way, where is that studio located? A. In Hollywood, California, sir.

Q. Have you prepared a list of each and every artist and each and every company in the United States to whom Columbia loaned players and from whom it borrowed players down to the present time? A. Yes, sir.

Mr. Frohlich: I should like to offer this list, which comes in two portions, in evidence.

Abraham Montague—By Defendant—Direct

Mr. Wright: No objection.

(Marked Defendant Columbia's Exhibits C-3-A and C-3-B.)

Q. When Columbia borrowed a player from one of the major defendants in this case—and, by the way, what is your definition of a major defendant? Have you got any? A. No, sir.

Q. Well, what is your definition of an independent producer? (1742)

A. One who has no connection with any other, sir.

Q. Now, when Columbia borrowed a player from a producer, an affiliated producer in this case, as appears by that list in evidence, did Columbia Pictures ever give any of its profits or undertake to give any of its profits to that producer? A. Whom we had borrowed the personality from?

Q. Yes. A. To the best of my knowledge, no.

Q. As a matter of fact, in instances where it borrowed a star, was Columbia unable to book its picture into the very theatre owned by the company from whom it borrowed the star? A. Yes.

Q. Can you give us one or two instances of that? A. Well, we can go way back to a picture with Clark Gable in it called It Happened One Night. We licensed that picture to Loew's Circuit and also to the opposition of Loew's.

Q. Now, the Loew's Circuit is the company owned by Metro? A. Yes.

Q. Which owns many theatres? A. Yes.

Q. And you licensed that picture to houses in opposition to Loew's. A. Yes, sir.

Q. And in my instances you did not license it to the Loew's theatres? A. In many instances we did not license (1743)

it to the Loew's theatres.

Abraham Montague—By Defendant—Direct

Q. Now, as a matter of fact, does Columbia face competition from all of the defendants in this case? A. May I have the question repeated, sir?

Q. Does Columbia face competition from all of the defendants in this case? A. Yes, sir.

Q. Is the competition keen? A. Very keen.

Q. And constant? A. And constant.

Q. Are there many fine pictures produced by independent producers in the United States? A. I would say yes, sir.

Q. Have you at my request prepared a list of successful pictures, pictures that were successfully artistically and financially in recent years and which were produced by independents throughout the country? A. Yes, sir.

Q. I show you this list and ask if that is an accurate list of pictures of that kind? A. I believe it to be accurate, sir.

Mr. Frohlich: Any objection.

Mr. Wright: No. I would like a copy.

Mr. Frohlich: I will let you have one, Mr. Wright (handing).

(Marked Defendant Columbia's Exhibit C-4.)

Mr. Raftery: Mr. Frohlich, is the list confined to Columbia only?

Mr. Frohlich: Independent producers throughout (1744) the country.

Mr. Raftery: You have got United Artists pictures?

Mr. Frohlich: United Artists pictures, Universal pictures, and others.

Mr. Davis: That is, all but the five consenting defendants in this case?

Mr. Frohlich: That is right.

Abraham Montague—By Defendant—Direct

Q. I will show you a copy of this list, Mr. Montague, and ask you if you can go down the list and give us a half dozen instances of outstanding pictures, pictures of great appeal and great success. A. Am I supposed to stick to Columbia?

Q. No, keep away from Columbia as much as you can. A. 100 Men And A Girl, Universal. All Quiet on the Western Front, Universal. Showboat—

Q. All Quiet on the Western Front—that was the Erich Remarque picture of the book? A. Yes, quite so.

Algiers, by Walter Wanger, I see here. Modern Times and the Great Dictator, Charlie Chaplin. Edward Small, the Man In The Iron Mask. Howard Hughes, the producer, Scar Face. Selznick, the producer of Rebecca, Gone With The Wind. Harold Lloyd Corporation, The Freshman. Walter Disney, Snow White and The Seven Dwarfs. Samuel Goldwyn, Wuthering Heights, Stella Dallas, Dead End. (1745)

Hal Roach, Topper; Of Mice and Men. Gene Autry (Westerns) produced by Republic Pictures Corporation. That Hamilton Woman, produced by Alexander Korda. Frank Lloyd Productions, Howards of Virginia. Columbia: Here Comes Mr. Jordan; Penny Serenade; My Sister Eileen—

Q. Well, let us have others besides Columbia. A. I think I have gone over the list and I have given a few from each one of the producers.

Q. Now, in addition to the competition based by Columbia from independent producers in the United States, do you face competition by producers in foreign countries? A. Yes, sir.

Q. Whose pictures come over here? A. Yes.

Q. And are released in the United States? A. Yes, sir.

Q. I show you this list of foreign pictures which were distributed in the United States and ask you whether this is a fairly comprehensive list of the successful pictures so released? A. Yes, I think it is.

Abraham Montague—By Defendant—Direct

Mr. Frohlich: I should like to offer that in evidence. Any objection, Mr. Wright?

Mr. Wright: What is this?

Mr. Frohlich: A list of foreign pictures released in the United States.

(1746)

Mr. Wright: Well, we have no objection.

(Marked Defendant Columbia's Exhibit C-5.)

Q. Will you be good enough to look at that list for a moment and just read off to their Honors a number of the outstanding and successful pictures on this list?

The Witness: May I have a copy of the list, sir?

Mr. Frohlich: Oh yes, I am sorry (handing).

A. Henry VIII; Maedchen in Uniform; Mayerling, 39 Steps; Pygmalion; The Lady Vanishes; Goodbye Mr. Chips; Count of Monte Cristo; The Scarlet Pimpernel; Pepe LeMoko; In Which We Serve.

Q. What have you found in this industry in the past 10 years with respect to independent production? Has it increased or decreased? A. Increased.

Q. Considerably so? A. Considerably.

Q. And have a great many important pictures been released in the United States as well? A. Not in the last few years, sir.

Q. But the increase has been with respect to domestic production? A. Yes, sir.

Q. And what would you say today is the state of affairs with respect to independent producers? Are there a great many more than there were in 1935? A. Yes, sir, and they seem to be growing all the time.

(1747)

Q. To your knowledge—

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Mr. Wright: May I have that last question and answer read?

(Question and answer read.)

Q. To your knowledge has any independent producer in this country ever had any trouble or difficulty in having his pictures released or distributed throughout the United States? A. I know that they have all been distributed. I can't tell you just what difficulties they may or may not have in negotiating for that distribution, but they have all reached, to the best of my knowledge, the market.

Q. Do you know of a single producer who made any kind of a picture of any importance in this country who was unable to have it distributed in the United States? A. I do not know of one.

Q. In making your deal, Mr. Montague, with exhibitors, what is your primary objective, and what factors do you take into consideration in these negotiations? A. Well, our first interest is how much we can get out of a given situation or out of the territory as a whole. We in most cases attempt to license our film to what we call our old and standard accounts, be they so-called affiliated or independent. We are always anxious and seeking an increased market and to develop the market that we have on the highest terms that we can secure.

(1748)

Q. And to how many theatres at the present time do you sell your product? A. Well, we sell a major part of our program to something between 10,500 and 11,000 accounts in the United States. We have licensed certain pictures to as many as 13,700 theatres in the United States.

Q. That has been the exception, hasn't it? A. That was the exception, sir.

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Q. And that, of course, was true only with respect to outstanding pictures? A. That was true with respect to one picture called Cover Girl.

Q. But aside from these exceptions, your general product is licensed to approximately ten or eleven thousand exhibitors? A. Correct, sir.

Q. And that means that you negotiate approximately 10,000 contracts a year, doesn't it? A. Oh, we negotiate a great many more than that, sir. We renegotiate with many houses for more pictures than they may buy the first time.

Q. And you carry on these negotiations each year, don't you? A. We carry them on each year, sir, in the main.

Q. Under your method of selling pictures, you have one sales campaign a year, do you not? A. We have what is (1749) called our major one sales campaign a year.

Q. During what period does that campaign take place?

A. Well, the campaign will usually come out if it is on time somewhere between March and April.

Q. And then in conjunction with the campaign do you have sales conventions? A. Yes, sir.

Q. And is that held only once a year? A. Well, we may have what is termed a sales convention once a year. We may have other meetings during the year with various members of our sales force.

Q. And after your sales convention your salesmen are instructed to go out into the highways and byways and make the deals as best they can with exhibitors? A. Yes, sir.

Q. If you had to sell pictures in small blocks of two or three or five, wouldn't you have to go through that entire campaign many times a year? A. Well, if we had to sell them in groups of five we would have to go through that campaign eight or nine times a year, sir.

Q. Could you sell in small groups with the present sales force? A. We would have to augment our sales force considerably.

Abraham Montague—By Defendant—Direct

Q. And you would be involved in very substantial expense, wouldn't you? A. We would be.

Q. Now, in making your contract with the exhibitor do you treat affiliates and independents on an equal basis? (1750)

A. We do, sir.

Q. Do you give the same terms to the independent that you give to the affiliate? A. In many cases we try to get as good. In some cases we succeed and in others we do not.

Q. Let us take the specific term of selectivity. Just what is that? A. I beg your pardon?

Q. What is selectivity? A. It is where an exhibitor does not buy all the film that we have; where he has a selection out of the number that we might have.

Q. In other words, instead of taking your entire number of features he has a right to say, "I will take only 20 or 25," instead of the 40 or 45, or whatever it is? A. Yes, sir.

Q. Now, do you frequently give that to affiliates? A. Yes, sir.

Q. And do you frequently give that to independents? A. Yes, sir.

Q. Do you give the independents the same right of selectivity that you give the affiliated throughout the United States? A. As a rule the independent has a little edge on the affiliated. The affiliated run in the main more important pictures, and we try to be quite a bit more definite on those contracts.

Q. Now, how do you approach clearance when you negotiate your deals? A. Well, clearance is something we usually (1751)

find when we arrive there and we usually negotiate our deal within the clearance that we find.

Q. You don't in each instance, in every contract, attempt to set up a new clearance, do you? A. It would be impractical and impossible, sir.

Abraham Montague—By Defendant—Direct

Q. As a matter of fact, has not clearance been an established part of this industry for a great many years? A. It has. It was augmented back in the days of the NRA.

Q. And speaking of the NRA, you were, of course, with Columbia at the time the NRA came into existence, weren't you? A. Yes.

Q. Did the NRA have anything to do with the contract that Columbia uses for its licensing with exhibitors? A. Well, to the best of my knowledge at that time Columbia became part of the regulation in which the NRA tried to establish what was then known as the standard form of contract.

Q. And for whose protection was that? A. Principally for the exhibitors.

Q. Did Columbia, for one, attempt to comply with the regulation of the NRA in that respect? A. To the best of my knowledge it did, sir.

Q. Did the NRA have anything to do with the so-called admission price clause in the contract? A. Yes, it did, sir. (1752)

Q. Please tell us what. A. Well, after the NRA tackled the job of trying to set up a form of run and clearance in the various and many zones throughout the United States, it seemed to us who observed it carefully, they figured that the best way to do it was on some form of admission price, and they seemed to have tried to go along in that direction of established admission prices. I remember that particularly as to several arguments that came before us in the case of Los Angeles.

Q. There has been some testimony given in this case, Mr. Montague, about clearance hinging upon the admission charged by a subsequent-run theatre. Have you heard the testimony here in the courtroom? A. No, I did not, sir.

Q. Well, have you at various times in contracts with exhibitors who are affiliated with the five defendants here

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given clearance dependent upon the admission price of second or third or fourth-run? A. I believe we have in some instances, sir.

Q. In other words, 30 days ahead of a house that charges 30 cents, 50 days ahead of a house that charges 25 cents—I am taking arbitrary figures—something of that kind. A. Yes, something of that kind.

Q. Have you also given that clearance to independents? A. We have given probably a like clearance to independents, yes, sir.

Q. I call your attention to the exhibitors in Malden, Massachusetts, Southgate California, St. Joseph, Missouri, and Akron, Ohio. Have you given those exhibitors who are independent exhibitors the identical form of clearance? A. I believe we have, sir.

Mr. Wright: What were the four towns again?

Mr. Frohlich: Malden, Mass., Southgate, California, St. Joseph, Missouri, and Akron, Ohio.

Q. Have you ever knowingly permitted any exhibitor in this country to over-buy your product? A. Not knowingly. It would be of no advantage to us to sell an over-buy situation.

Q. Will you explain to the Court what over-buy means?

A. Well, over-buy is a term where an exhibitor has all the film he can use, a little more, and he still seeks more film on top of that.

Q. And what would be his purpose in seeking more film?

A. Well, I would say in some cases they seek to do that to control the situation as to the film.

Q. And to keep film away from a competitor? A. It could be for that purpose, sir.

Q. And have you ever knowingly embarked on that kind of a contract? A. No, sir.

Q. Have the exhibitors in the country in the last ten years been successful, if you know? The exhibitors. A. The ex-

Abraham Montague—By Defendant—Direct

(1754)

hibitors have been very successful in the last ten years.

Q. And have made a lot of money in the last five years, haven't they? A. According to some of the Government statistics, I would say so, yes, sir.

Q. And they have increased their admission prices substantially, haven't they? A. Yes, sir.

Q. And do you know of any exhibitors who are anxious to sell their houses? A. No, sir.

Judge Hand: Why do you say block booking is so necessary for you? Is it because you do not own any theatres?

The Witness: Well, it could be one of the reasons, sir, and it is necessary because our type of program is the type of program that runs from the most expensive pictures down to what we call the B grades, the commercial grades of film. We would find it most difficult because of the numbers and the type of quality, and so forth, to continuously go back. We sell so many of these pictures to the small villages and hamlets all throughout the United States who cannot come to the market as often as they would like to. Now, we could not get there fast enough unless we augmented our sales force considerably; we would not have the money to wait, to hold this inventory on the shelves, so-called inventory, meaning these pictures, on the shelves, while we are waiting to get in

(1755)

there. Our particular company's success has been on the rapid turn-over of its pictures.

Q. Have you ever compelled an exhibitor to take your short pictures in order to obtain your features? -A. No, sir.

Judge Goddard: I do not quite understand that. If you tell us that you sell your entire product at one time, that would include shorts and everything else, would it not?

Abraham Montague—By Defendant—Direct

The Witness: We attempt to sell our entire product at one time, but it is only a small percentage of the theatres in the United States that we succeed in doing that. It usually ends up with the exhibitor having a selective contract. He may or may not buy any shorts at all.

Judge Goddard: On an average how many pictures does the contract include, a block?

The Witness: Sir, on our feature program, meaning 44 pictures in that form, which excludes the Westerns, we average about 32 across the United States to an account.

Q. You do not condition the selling of features upon the taking of shorts, do you? A. No, sir.

Q. And if an exhibitor does not want your shorts you will sell him your features just the same? A. Yes, we will try to sell him the shorts; we will use all the salesmanship (1756) that we have, if he uses shorts.

Q. But you have never withheld your features from an exhibitor because he would not use your shorts, have you?

A. We could not afford to do so, sir.

Q. Have you ever had instances where your exhibitor has changed his admission price after he made his contract with you? A. Yes, sir.

Q. Have you had instances where the change was upwards and he increased his price? A. I believe so.

Q. Have you had instances where the change was downward and there was a decrease in price? A. I have heard of such instances, sir.

Q. Did you ever take any action with respect to an exhibitor who did that? A. No, sir, unless by the so doing of it he was interfering with the contracts, our licensing contract with the prior account.

Abraham Montague—By Defendant—Direct

Q. As a trade practice isn't it a fact that from time to time exhibitors come in to you and seek adjustments on their contracts? A. Well, they don't come in to me, Mr. Frohlich. They go to the various branches.

Q. When I say "you", I mean Columbia Pictures. A. Yes, sir.

Q. That is very prevalent, isn't it? A. So prevalent, sir, that we are through counting the changes by the week; we now measure them by the foot.

(1757)

Q. And do you accommodate these exhibitors and give them these adjustments? A. Yes, I would say it is an accommodation, sir.

Q. And do you treat the independent exhibitor as well as you do the affiliate on these adjustments? A. We give less adjustments, much less adjustments to the affiliate than we do the independent. Our records will substantiate that.

Q. Do you give all the breaks to the independent? A. If you want to call it breaks, yes, sir.

Q. Yes, that is what I want to call it.

(1758)

Judge Bright: Why is that?

The Witness: Well, we know pretty well—we will say that we know a little more about what the affiliate can take, and we follow them a little careful as to the gross of their theatres, but you take the mass of theatres in the small towns, we don't know too much about them. He comes in and says, "Such and such a picture played. I didn't do very well with it. You charged me too much for it." And he says, "We believe we should have an adjustment." We believe a certain amount of adjustments is a good idea because we believe we can get more good will with that. Now, when it comes to the affiliated, we don't have quite as much consideration, sir.

Colloquy

Judge Bright: You license largely on percentage licenses?

The Witness: No. Very largely on the flat side of our selling, whereby we sell a man a picture for \$50 and he will come in and say, "I only took in \$51. I think we should have an adjustment." We don't know whether he took in \$51 or not, but we know our accounts pretty well. We have what we call a chronic complaining list. It is a common expression in the exchanges, that they keep a towel there so as to wipe up the tears of these fellows coming in. In other cases we have fellows who really need help, have hit hard times, or a picture didn't do good business, it hurt their

(1759)

Saturdays and Sundays if they played them, and they need help legitimately, and they get it, and we consider that part of our business.

Judge Hand: That would be almost like a trade discount.

The Witness: It is a trade discount, sir. I think it is almost taken in the mind of some exhibitors at the time they buy the contracts.

Judge Bright: Where you sell a block of pictures to one exhibitor, that is at the beginning of your season, isn't it?

The Witness: Yes.

Judge Bright: They buy blind as to some of them?

The Witness: Yes, sir, we got only a few films produced he can see. The rest of them are on description, and he really and truly buys on what we call past performance—what has Columbia's past performance been with that exhibitor over the period of years that we traded with him.

Judge Bright: Do you sell to these so-called majors, five majors, by block licenses?

Colloquy

The Witness: We sell them by block, sir.

Judge Hand: Right along?

The Witness: Right along. We have since our beginning and still do, sir.

Judge Goddard: Just the same, same as to the
(1760) independents?

The Witness: I did not get your question.

Judge Goddard: Are blocks sold comparatively the same size as those sold to the independents?

The Witness: Comparatively. In some of their big theatres we cannot sell as many. In some of the smaller theatres we can sell more because they can use some of what we call our B-grade films. If the theatre is such it does not use B-grade films, of course, we cannot sell them or license the film—that would be a better expression.

Judge Hand: If I understand the thing at all, to sell to an exhibitor a lot of 40 plays would be a perfect gamble as far as he is concerned as to half of the plays submitted?

The Witness: Well, sir, from your seat I can understand that you could think so, but a lot of these exhibitors would like not only to buy 44 but they would like to buy 84, if we have them, because they need the film. They are changing in these towns—some of them use as many as six, and some eight and 12 pictures a week, if they have a double bill. They need these pictures. If you try to take them away and give them to somebody else in that town, you see the squawk they put up, because they feel that is their measure of protection and they want it.

(1761)

Judge Hand: That is because, I suppose, then, that they have so many different theatres they can

Colloquy

place them. Supposing, for example, Paramount or Loew or Fox or any of these defendants, had but one theatre, one big theatre. They certainly wouldn't do it then unless they went into an absolutely blind gamble, would they?

The Witness: They wouldn't do it unless they needed the films that I had to offer. If they only had one theatre in, a situation and they played only 52 pictures a week, I wouldn't have a chance, sir, to get in my group of pictures.

Judge Goddard: 52 a year?

The Witness: 52 a year. Pardon me. Correction. Thank you.

Judge Bright: You mean these men that want the block buying most are those that change their program oftenest?

The Witness: Yes. I think they want them most, probably, but the larger exhibitor needs it just as bad as the small one. He wants to know, because of competition, what pictures he is getting. At least we find it so from our own distribution. We have no trouble at all in distributing through block selling. In fact, we have attended meetings back there sometime ago where the exhibitors as a whole were meeting from all over the country, trying to get all these companies

(1762)

to plead—to get away from this so-called small group selling. They wanted to buy all; they wanted to buy their season's product from all the companies. They called them the umpty meetings at the time. I have forgotten just what umpty stood for, but it was a whole series of meetings, whereby they actually made a very strenuous plea—

Judge Bright: Exhibitors?

Abraham Montague—By Defendant—Direct

The Witness: Yes, sir. (Continuing)—to do away with this consent decree form of selling.

Mr. Wright: I think he means independent exhibitors, is that right?

The Witness: Independent exhibitors were there, and also affiliated, Mr. Wright.

Judge Bright: That demand or suggestion, you say, comes from the small town exhibitor more than the large one?

The Witness: It would come from small towns, and it would come from large ones, depending on the need of the film to the exhibitor, whether he had a competitor, whether he had a double feature policy, whether he had a single feature policy, whether he run three shows a week, changed three times a week, or whether he changed seven times a week. There are so many things that come into the individual situation as to why that particular exhibitor wants to buy that

(1763)

particular way.

Q. Mr. Montague, did you make up at my request a list of all the cities, up to 418, which have a population of 25,000 and over, and include in that list the name of the exhibitor, whether he is an independent or affiliate, how you sold to that exhibitor, in other words, did you sell to an independent in the town or an affiliate, whether it is a closed town of affiliates or a closed town of independents? A. I instructed such a list to be made, sir.

Q. And I show you this list and ask you whether this is the list that you made up? A. Yes, sir, this is the list we had made up, sir.

Q. When I use the expression "Closed town of affiliates" or "Closed town of independents", just what do I mean by

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that? A. I assume you mean a town that has no competition, sir.

Q. In other words, if a city has, say, two or three affiliated theatres and no comparable independent theatre, would you call that a closed town of affiliates? A. Well, if there were other theatres there, I would not call it a closed town, sir. It might be closed as to a run.

Q. I am speaking of first-run. A. Yes, sir.

Q. Comparable theatres of first-run only, it would be a closed first-run. This list is related only to first-run theatres? A. Yes.

Q. And would the same hold true of a situation where an independent owned all of the important theatres in the city? A. Yes, sir.

Mr. Frohlich: I should like to offer this list in evidence.

Mr. Proskauer: I would like to see it.

Mr. Frohlich: I have no copy of it.

Mr. Wright: I have no objection, providing we can have a copy before he leaves the stand.

Mr. Frohlich: I will be glad to leave the list with Mr. Wright when—

Mr. Wright: We might have to defer cross-examination.

Mr. Proskauer: May I take a look at it, with your Honor's permission?

Mr. Frohlich: I am sorry, if I have kept the Court waiting. I want to interrogate on this list.

Q. Mr. Montague, the counsel—

Mr. Proskauer: Mr. Frohlich, before you go ahead, may I suggest we get through with this? And I would like to ask you this question. Does Mr. Monta-

Abraham Montague—By Defendant—Direct

gue call a closed town one where there is competition between two different affiliated theatres for first-run? In Detroit you have that marked a closed town. In Detroit there is competition, isn't there, between (1765) different affiliates first-run?

The Witness: The competition, I know, is between an independent and an affiliate.

Mr. Proskauer: But you have it marked a closed town on here.

The Witness: What town did you give me?

Mr. Proskauer: Detroit.

The Witness: No, you are absolutely right, there is competition in Detroit between the affiliates.

Mr. Proskauer: Between whom?

The Witness: Between Fox on the one hand, the Fox Theatre operated by National Theatres Company, I believe, or some other corporation—I can't remember the name of the corporation—and theatres operated by an affiliate of Paramount. That would not be a closed town as to first-run.

Mr. Proskauer: It is marked "closed" on this list that is tendered.

Q. Wouldn't it be closed so far as the independent is concerned? In other words, let me make this clear to you, Mr. Montague. Let us get this straight. If you go into a town and there is only one theatre there owned by an affiliate, or two theatres owned by two affiliates, or three owned by three affiliates, is that an open or closed town, as far as you are concerned? A. Open town.

Mr. Frohlich: Then this list isn't correct. Then I withdraw it.

Colloquy

(1766)

Mr. Proskauer: May I make a practical suggestion, with the Court's permission? Mr. Frohlich, obviously, in making up this schedule, there has been confusion in the use of the terms "open" and "closed." My suggestion is, you go over it overnight and re-tender it tomorrow, corrected to meet the various suggestions.

Mr. Frohlich: I shall eliminate from the list the column designated "Closed".

Mr. Wright: I might say we —

Mr. Frohlich: That is the only way I can do without —

Mr. Wright: (Continuing) — we should like to have it as it is for purposes of cross-examination.

Mr. Frohlich: Now I am in a spot.

Mr. Caskey: Would you like to have it, even if it is inaccurate, Mr. Wright?

Mr. Wright: I said for purposes of cross-examination we should like to have it as it is, and it will appear to the extent to which it is accurate or inaccurate.

Mr. Proskauer: We are under the necessity of interposing an objection, which is not in any sense technical.

Mr. Frohlich: I should like to offer it now.

Judge Hand: Now?

Mr. Frohlich: Yes, and I am going to say to the

(1767)

Court I should like to offer it now and eliminate from the consideration of the exhibit the columns called "Closed" and "Competitive", because they seem to give rise to a lot of dispute here.

Mr. Proskauer: You will offer the list of accounts to which you sold?

Mr. Frohlich: I will ask the Court to consider only one column, that we sold, whether independent or affiliated.

Abraham Montague—By Defendant—Direct

Mr. Proskauer: We have no objection to a list of the accounts to whom he sells. Everything else is out of it?

Mr. Frohlich: I think that will eliminate all dispute then, your Honor.

Mr. Proskauer: It is clearly understood that the last two columns marked "Open" and "Closed"—and "Competition"—are not a part of the exhibit.

Mr. Frohlich: That is right.

Mr. Wright: That is not understood as far as the Government is concerned. We object to the exclusion of any part of the exhibit until it is apparent from what the witness has to say about it, as distinguished from counsel, as to what its accuracy or inaccuracy is.

Mr. Caskey: The witness has already testified.

Judge Hand: I will overrule your objection. I do not know any way of your compelling him to offer

(1768)

something that he does not want to offer.

(Marked Defendant's Exhibit C-6.)

Q. For the information of the Court, Mr. Montague, what was that blue circle around the "I"? A. I would like to see them. I may be able to explain it. I haven't had it in my hands yet.

Q. Didn't you see it last night? A. Yes, sir, but I would like to see it again, if I may.

Q. I just want that for the information of the Court. You will notice wherever the letter "I" appears there is a blue pencil mark around it.

Judge Bright: I thought those columns were out.

Mr. Frohlich: Not that column, Judge Bright. The other two columns. This is the first column. There are three columns altogether. This is the first

Abraham Montague—By Defendant—Direct

column, showing selling to independent or affiliate. The other two columns have to do with closed situations. They are out.

Q. Have you in front of you, Mr. Montague, a list of the 92 cities that has been put in evidence in this case? A. I believe so, sir. I have this list here.

Q. I will have to go over this list with you, and I will try to make it as short as possible, and I want you to make your answers as brief as you can. Akron, Ohio, to whom do you sell there? A. First-run?

Q. I am speaking now only of first-run. To whom do (1769)

you sell there? A. The Akron Palace Theatre Corporation.

Judge Bright: Isn't that all in this list right here, to whom you sell? Isn't it all in this exhibit you just offered?

Mr. Frohlich: I was going to have him make some explanation of these theatres, of comparisons of theatres how long he has been selling, to whom, and why, and so on. I thought it might be helpful to the Court, instead of wading through a long exhibit.

If the Court feels that I shouldn't go into the 92 situations, I won't do it. I had some qualms about it, your Honors have heard so much about it.

Judge Hand: I should think you could do it in nucleus, asking general questions, and then I think it should be admissible, subject to cross-examination and motion to strike out.

Mr. Frohlich: I want to save time. I don't want to spend two or three hours on it.

Q. Mr. Montague, did you have a computation made of the list of 92 cities of 100,000 inhabitants and upwards, showing from 1936, '37, down to 1943-44 to how many independ-

Abraham Montague—By Defendant—Direct

ents you sold, to how many affiliates you sold each season?

A. Yes, sir.

Q. I show you this chart or series of charts and ask you whether that truly represents the amount of sales to affiliates (1770).

and independents in these respective years based upon one inch for—I think that is the scale—one inch to eight cities?

A. Yes, sir.

Q. That is correct, isn't it? A. Correct.

Q. That has been done for each season down to the very last season, 1944-45? A. Yes, sir.

Q. And these figures show, down to the very theatre, just how many independents you sold and how many affiliates you sold in these 92 cities? A. Yes, sir.

Mr. Frohlich: I should like to offer this chart in evidence.

Mr. Wright: Let us see just what it is now. These charts that you have just identified, Mr. Montague. These are tabulations based upon the admissions of fact which you submitted and which are in evidence, are they?

The Witness: They are a compilation of our figures taken from our records. Whether they are in evidence here or not, I would sooner have the lawyer answer that.

Mr. Frohlich: The admissions of fact cover alternate seasons. These are for every season from 1936 down. They are based on the admissions of fact.

Mr. Wright: There is nothing in these computations that is supposed to contradict or alter anything that has been offered by way of admissions of fact? (1771)

Mr. Frohlich: I am sure I can say no to that. They are entirely consistent with the exhibit that was

Colloquy

handed to you, Mr. Wright.

Mr. Wright: You have one blue column here on this first one. There is one of these for each season, is that right?

The Witness: Yes.

Mr. Wright: I notice, this 1936-37 season, you have a blue column, you have a figure $38\frac{1}{2}$ at the top. What does that mean?

The Witness: Just what it says there, sir.

Mr. Wright: $38\frac{1}{2}$ what?

The Witness: Theatres. For Columbia first-run accounts in cities over 100,000, season 1936-37, and that half was probably created by a split.

Mr. Wright: What you mean is that in 38 cities you sold the independents all of the Columbia product and in one more you split it between Columbia and an affiliated account?

The Witness: Yes, sir.

Mr. Wright: And then in 73 cities you sold the affiliated accounts exclusively, is that right?

The Witness: We sold 58— $53\frac{1}{2}$; which are not exclusive, but which were splits.

Mr. Wright: These figures refer to towns, $58\frac{1}{2}$, $38\frac{1}{2}$?

(1772)

The Witness: To theatres.

Judge Bright: To theatres?

The Witness: First-run accounts. An account is a theatre and not a town, sir.

Mr. Wright: You have one account in each of the 92 cities except where you split the product, is that right?

The Witness: We have a first-run account, and in this case there has been one account that we split the

Colloquy

product with an independent theatre, as we term an independent, and with an affiliated theatre.

Mr. Wright: Then isn't what I said correct, that this chart means that in 38 of the 93 towns you sold your pictures exclusively to an independent first-run account?

The Witness: Independent first-run theatre.

Mr. Wright: And in 53 you sold them exclusively to an affiliated first-run account?

The Witness: I don't like the word "exclusive", sir, because we don't sell exclusive. We sell it to first-run.

Mr. Wright: As far as first-run is concerned.

The Witness: Yes, sir.

Mr. Wright: Then in the other one town it was split between the two?

The Witness: Yes, sir, the product was split between the two.

(1773)

Mr. Wright: I don't quite understand. This says one inch equals eight scale. One inch scale what?

The Witness: One inch, I imagine, will equal—I am not too sure of this scale myself.

Mr. Frohlich: That means eight accounts.

The Witness: One inch to eight.

Mr. Frohlich: Eight accounts.

The Witness: Eight accounts.

Mr. Frohlich: One inch to each eight accounts.

Mr. Wright: We have no objection.

Mr. Seymour: May we see them, Mr. Frohlich?

Mr. Frohlich: I will have them marked first.

Mr. Seymour: I would like to see them before they are marked in evidence.

Mr. Frohlich: You want to see them first before they are marked?

Colloquy

Mr. Seymour: Before they are marked in evidence. I suppose, like other exhibits, these are offered subject to correction? This is just counsel's characterization—

Judge Hand: Yes.

Mr. Seymour: (Continuing)—of certain theatres being affiliated, and he may be wrong about it.

(Marked Defendant Columbia's Exhibit C-7.)

Judge Bright: What do you mean by "affiliates"?

The Witness: Affiliated is a term that we use

(1773a)

meaning that to the best of our knowledge a particular theatre is associated with a company that has distribution and production, or a company that is producing pictures, that has a theatre ownership of some theatre or theatres.

(1774)

Judge Bright: Not confined to the eight defendants here.

The Witness: We don't have any theatres. Columbia doesn't own a single theatre, or interest.

Judge Bright: It is not confined to the so-called five major defendants.

The Witness: Yes, we would call an affiliate one of the five defendants, namely, we call M-G-M, Metro-Goldwyn-Mayer; we call Paramount an affiliate; we call RKO an affiliate; we call Warners an affiliate, and we call Fox an affiliate.

Judge Bright: Are those the only five?

The Witness: Universal, to the best of our knowledge, does not have theatres, so we would not call them that. Republic, we don't believe—well, I think Republic has one theatre in New York, but we certainly would not classify them in the industry as an affiliate.

Judge Bright: I am trying to find out what you mean by an affiliate.

Abraham Montague—By Defendant—Direct

The Witness: A producer-distributor that has directly or indirectly some theatre connection.

Judge Bright: Are you referring to the producer-distributor and exhibitor in this case, or universally all over the United States, if there are any others?

The Witness: If there are any others, I am including them too, sir.

(1775)

Q. I neglected to ask one important question, Mr. Montague. Does Columbia own any theatres? A. No, sir.

Q. Did it ever own any? A. No, sir.

Q. Mr. Wright, Government's counsel, has had these defendants answer interrogatories or make admissions of fact with respect to 418 cities in the United States which have a population of 25,000 or over. Did you at my request have your department in Columbia make up a chart similar to the one just received in evidence, showing the number of accounts which Columbia has sold since 1936-1937, each season, down to 1944-45, to the independent theatre in these respective cities, also to the affiliated theatre in these respective cities? A. Yes, sir.

Q. I show you these charts and ask you whether these are the charts that were made? A. Yes, sir.

Mr. Frohlich: I should like to offer these in evidence.

Mr. Seymour: May we see them?

Judge Bright: Following up my last question to you, what do you mean by an independent?

The Witness: An independent theatre owner is one in our opinion that has no connection whatsoever with distribution or production. An independent producer is one who has no connection with theatres.

Abraham Montague—By Defendant—Direct

(1776)

Judge Bright: That does not help any. You are selling to independent theatre operators. Who are independent theatre operators?

The Witness: Who are independent theatre operators?

Judge Bright: Who do you refer to when you say you are selling to independents in these charts?

The Witness: We refer to an independent theatre in those charts as a theatre that we license our film to, that has no connection with any distribution or production, as far as our knowledge is concerned.

Q. And any connection with the five defendants in this case? A. Or any connection with the five defendants in this case that would be.

Judge Hand: That last, of course, identifies something. The first throws the whole case into confusion, as far as I am concerned. Mere unclassified confusion. What is the use of introducing such things and having such vague talk as this?

Mr. Frohlich: I thought the witness had testified as to what is an independent and what is an affiliated theatre, and I did not think there was any question about it.

Judge Hand: Absolutely vague. He sometimes says an affiliate is one of the big five, then he says anybody else. I did not think we were talking about anybody else except these five and the people that have been classified at different times as independents.

(1777)

Q. Do you know of any producer-distributor in the United States other than the big five in this case that owns any theatres? A. No, sir.

Abraham Montague—By Defendant—Preliminary Cross

Q. When you speak of an affiliated theatre, are you confining yourself to theatres owned or operated by the big five defendants in this case? A. Yes.

Q. When you speak of an independent theatre, Mr. Montague, do you mean a theatre which is not owned or controlled or operated by the big five in this case? A. Yes.

Mr. Caskey: I would like to examine on the voir dire before these are received.

Judge Bright: Oh, dear, did you say?

Mr. Caskey: Voir dire is as close to it as I can get.

Preliminary Cross Examination by Mr. Caskey:

Q. Mr. Montague, taking the 1944-45 chart, how did you classify the first-run theatres in Jersey City, Newark and Elizabeth? A. The first-run theatres we sell?

Q. Yes. A. If we sold it to one of the defendants here, it would be called affiliated. If we sold it to an independent it would be in the independent column.

Q. Did you sell Skouras in those three cities first-run? A. I would want to refer to the record, sir.

Q. Do you know of your own knowledge whether the (1778)

Skouras theatres in Jersey City, Newark and Elizabeth, are included in these charts? A. I don't know, sir.

Q. What about the Robb & Rowley, do you know whether they are included as an affiliate or independent? A. To us Robb & Rowley would be included, as we understand it, as an independent.

Mr. Seymour: I assume these, if received, will be taken subject to correction, because it is his characterization which is being received.

Mr. Frohlich: Any further questions, Mr. Caskey?

Mr. Caskey: My objection to them is that they are lumping a great many things under one heading. It

Colloquy

may be that National Theatres are affiliated but they certainly are not affiliated with anybody else but National Theatres, and these picturesque charts may some day prove to be misleading.

Mr. Frohlich: I did not think there was any serious dispute in this case up to now as to what is an independent theatre in this case and what is an affiliate.

Mr. Caskey: Not in the least, but there is a dispute in my mind whether that kind of chart should come in which lumps National Theatres with the Sparks theatres in Florida in one basket.

Judge Bright: Does the chart show what theatres are lumped as independent or what theatres are

(1779)

lumped as affiliated, or is it just the statistical information as to the number they sold?

Mr. Caskey: The statistical information puts the theatres of all these defendants into one chart without any separation.

Judge Bright: Aren't you trying to get a shoe on your foot which may not fit? How do you know it includes theatres which you say are not affiliated, in the affiliated column?

Mr. Caskey: I don't know it, but I understood him to say that it did. I think the chart would be much more helpful if it showed each one of the defendants separately, at least indicating on the chart for each company the number of accounts. Then what the conclusion may be will be for argument and for the Court.

Mr. Frohlich: I offer the exhibit, your Honor.

Mr. Caskey: We have an objection.

Judge Hand: Received.

(Marked Defendant Columbia's Exhibit C-8.)

Abraham Montague—By Defendant—Direct

By Mr. Frohlich:

Q. Just a few general questions, Mr. Montague. There has been some testimony about Blumenfeld out in California. What cities does he operate his theatres in? A. He has quite a list of cities, Mr. Frohlich. I know of some of them offhand. I don't know all of them. I would want to refer to the list. (1780)

Q. Has he any in Oakland? A. Yes, sir.

Q. San Francisco? A. Yes, sir.

Q. Sacramento? A. Yes, sir. Stockton.

Q. Does Columbia sell him? A. Yes.

Q. Are there affiliated theatres in those cities? A. Yes, sir.

Q. And has Columbia sold Blumenfeld for many years? A. Many years.

Q. Find him a satisfactory customer? A. A very satisfactory customer.

Q. There has been testimony in this case that Blumenfeld theatres have suffered by comparison with the affiliated theatres in the respective cities. What do you say on that subject? A. I am not an expert, sir, as to the qualifications as to whether one theatre has a better appointment than another, but I feel that as far as Columbia goes we can get more income out of the Blumenfeld theatres than we can get out of any other theatres in that particular zone. That is why we sell him or license our films to him.

Q. Even though Blumenfeld's theatres are smaller? A. Yes, sir.

Q. Less seating capacity? A. Yes, sir.

Q. Does he take all of your product or most of it? A. He takes most of our product. (1781)

Q. What would you say the affiliates in those cities would do with most of your product? A. I don't think that they

Abraham Montague—By Defendant—Direct

could use as much film. I don't believe they could run my important pictures as long as Mr. Blumenfeld can run them. Therefore it is our considered opinion that we are much better off selling Mr. Blumenfeld than we would to the affiliates.

Q. What is your general custom and practice throughout the country in respect to these affiliates and independents? Whom do you prefer to sell and whom do you sell most of your pictures to? A. We prefer to sell the accounts that we think we can get the most out of for our over-all program.

Q. Who are those accounts? A. In many situations they are the independent; in others they are the affiliates.

Mr. Frohlich: May I have about five minutes? I am trying to get some figures that will shorten this examination, and then I will be finished.

(Short recess.)

By Mr. Frohlich:

Q. Now, Mr. Montague, in 1943 and 1944, what amount did Columbia take in in the United States from the exhibition of its pictures in all theatres? A. Just feature pictures—

Q. Feature pictures only, nothing about Westerns or (1782) shorts, just feature pictures? A. Approximately twenty millions of dollars.

Q. And how much of that twenty millions of dollars came in from affiliated theatres? A. I would say approximately one-third.

Q. About six million or seven million dollars? A. Yes, sir.

Mr. Frohlich: No further questions.

Abraham Montague—By Defendant—Cross

Cross Examination by Mr. Raftery:

Q. Mr. Montague, in response to one of Judge Bright's questions, you stated that your service that you sold in a group contract was needed in small towns where an exhibitor used a number of pictures, is that right? A. Yes, sir.

Q. Now, in your cities, including the 92, or the 482, or whatever they are, you have suburban runs, neighborhood runs, in addition to the first-runs downtown, isn't that right? A. Yes, sir.

Q. And how much of the country today is double feature? A. A good portion of it.

Q. Would you say 80 per cent? A. No, I would not say 80 per cent; maybe 75 per cent of it.

Q. Well, 75 per cent. That is numerically as well as territorially, is that right? A. Yes.

Q. And in those neighborhood runs and in those suburban runs they need many more pictures each week than (1783) they do in the first-run downtown, isn't that right? A. Definitely so, sir.

Q. And it is very comparable to the number needed in the small towns? A. Yes, sir.

Q. And when you start out to sell your service, you have your salesmen's eye directed on those suburban runs, neighborhood runs, and small town runs, do you not? A. Yes, sir.

Q. And you seek to sell him the service that he needs to keep his theatre open, isn't that right? A. Yes, sir.

Q. And in the big towns in the first-runs, you supply a great deal of the features that are called second features, do you not? A. We supply a number of pictures that are termed second features.

Q. Yes. They will play one picture which they advertise as the first picture, isn't that a fact? A. Correct.

Q. Then they advertise the second feature? A. Correct.

Abraham Montague—By Defendant—Cross

Q. That is true in Boston, New York, and many other of the big cities, is it not? A. Where they have the double bill, yes, sir.

Q. Where they have the double bill? A. Yes.

Q. And when you talked about trying to sell an exhibitor as many pictures as you can, you and your associates analyze the needs of each particular theatre, isn't that right? (1784)

A. Correct, sir.

Q. And when you told Mr. Frohlich on this over-buying situation, you go into this account and try to sell him as many of the features as you—and when I say you, I mean you and your subordinates—feel that theatre needs to keep that theatre open? A. Correct.

Q. Now in New York City, where do you exhibit your pictures first run on the Island of Manhattan? A. Our first-run is with Radio City Music Hall, and we also play some first-runs in the Capitol, in the Criterion, in the Rialto, and the State theatre.

Q. Now the preferred first-run—and I am going to borrow Mr. Wright's term—preferred first-run—that is what? A. Radio City Music Hall.

Q. And how many pictures a year are you able to get exhibited in the present market in the Radio City Music Hall? A. In a good year it might be five to six.

Q. Well, by a good year, you mean good for you? A. Good for me, yes, sir.

Q. Well, in a good year, meaning the kind of a market we are in now, how many do you get? A. I think last year we have three or four pictures in Radio City Music Hall.

Q. In the 52-week period? A. Yes, sir.

Q. And how many weeks did those three or four pictures play? (1785)

A. One of them played six weeks; another one played six weeks; one played three weeks; I think one played either two or three weeks.

Abraham Montague—By Defendant—Cross

Q. That, I think, the Government has classified as an independent picture; isn't that right? A. Yes, sir.

Q. That operated by the Rockefeller interests? A. Yes, sir.

Q. Now, after you are able to place, we will say, your top pictures of that caliber—those are your top pictures, are they not? A. Yes, sir; part of our top pictures. We would say they are part of our top pictures.

Q. Well, as far as the Music Hall is concerned, the Music Hall considers them the top pictures that you have? A. Quite so.

Q. So then you start out and you try to place the remainder of what you call the top pictures, in your next best outlet, isn't that right? A. Yes, sir.

Q. First-run? A. Yes, sir.

Q. Now, where do you place those? A. Well, we may try to place them in the Roxy or the Capitol or the Criterion or the State or the Rialto, or any other theatre that we think may be available.

Q. Do you try the Globe occasionally? A. I beg pardon?

Q. The Globe? A. Yes, the Globe; but we have not played there a top picture for quite some time.

(1786)

Q. That is because United Artists have been using the playing time? A. Well, somebody else has been getting it. We have not.

Q. In the Gotham? A. We have not played a picture in the Gotham.

Q. In the Victoria? A. No, we have not played a picture in the Victoria.

Q. The Astor? A. No, we have not played the Astor for a long, long while.

Q. And then you have a great many pictures that never get a first-run in downtown Manhattan, isn't that right? A. Quite so, sir.

Abraham Montague—By Defendant—Cross

Q. And that is due generally in the great big cities, isn't it? A. Quite true.

Q. Now the pictures that play in a theatre like the Music Hall, do you have any trouble selling them to the independent accounts or the affiliated accounts that follow the Music Hall, outside of getting the price you want? A. They are under contract to these following theatres, probably prior to the time we play the Music Hall; so consequently we would not have any difficulty selling it. We do not have any difficulty dating them.

Q. Now let us come to that. You have sold your pictures in advance? A. Quite so.

Q. To, we will say, part to the Loew's circuit, and some (1787)

to Randforce—I am not saying the same runs; I am talking different runs—some to Skouras, some to Brandt; and we can go on and name many more accounts in the suburban areas of New York City. You have sold them in advance to those accounts, isn't that a fact? A. Yes, sir.

Q. And you have no trouble, you say, getting those Music Hall pictures dated and played and paid for in your sub runs? A. None, whatsoever, sir.

Q. Now that equally applies, we will say, to the pictures that have had a run in the Capitol theatre? A. Yes, sir.

Q. Or the Criterion theatre? A. Yes.

Q. Now let us look at those pictures that have never had a first-run of that kind. Do you have any trouble getting those dated in the sub runs? A. Great trouble, sir.

Q. So a picture that has been established by a fine run in a fine theatre—that is the type of picture that will almost automatically date itself all the way down to that last ten-cent run; isn't that the fact? A. Quite true.

Q. And many times these ten and fifteen and 25-cent runs will book them back again; isn't that a fact? A. If we allow it.

Abraham Montague—By Defendant—Cross

Q. Now, you referred to, *It Happened One Night*. Has (1788) that picture had more repeat books than any picture you ever released? A. Many more.

Q. Many? A. Yes.

Q. Not that picture was played first-run in the key cities, was it not? A. Yes, sir.

Q. It was moved over? A. Yes, sir.

Q. It had an extended first-run in most of the cities? A. In many of them.

Q. And had an extended move-over? A. In some of them.

Q. And perhaps was moved over again? A. And repeated and brought back several times.

Q. So you have heard the expression in the business, "There is no evil in this business that good pictures won't cure"? A. Yes, and I believe in that.

Q. And you subscribe to that? A. Yes.

Q. So in talking about this weeping towel that is kept in each exchange, that has to do with the pictures primarily that do not have the first-runs and the move-overs, isn't that a fact? A. They are not what we call in the business the "sock" pictures.

Q. In other words, Mr. Montague, you as the producer of these pictures—and I refer to these pictures as the pictures that don't have the first-run and are not known as the "sock" pictures—you assume generally the whole risk of loss (1789)

connected with that type of production, do you not? A. Yes, sir.

Q. And the exhibitor who exhibits these pictures, those are the pictures that he objects to playing, isn't that so? A. It is easily those pictures, sir.

Q. Now what are you talking about is equally true of the problems of your competitor, Republic, is it not? A. I would believe there is the same problem.

Abraham Montague—By Defendant—Cross

Q. And Universal? A. I would believe they too have the same problem.

Q. And also P.R.C.? A. Yes, sir.

Q. And Monogram? A. Definitely so.

Q. Now in connection with the various meetings you talked about with exhibitors, Mr. Wright stated that it was the independent exhibitors who objected primarily to the blocks of five or less; and I think you stated the affiliated exhibitors took part in those meetings? A. To the best of my knowledge they did, sir.

Q. Have these meetings been held since the entry of the consent decree? A. It was after the consent decree, to the best of my opinion.

Q. The meetings were with the distributors and exhibitors? A. At that time there was distributors and exhibitors, yes, sir.

Q. Was the distributors association represented? A. (1790)

Yes, they were all represented to the best of my knowledge.

Q. What are the two large exhibitors associations? A. Well, there is the Allied and the Motion Picture Theatre Owners of America.

Q. The Allied is the Abe Myers Association, so-called, is it not? A. So called, yes.

Q. And the M.P.T.O.A. was formerly headed by—what was his name, Kuykendal? A. Kuykendal.

Q. And that association had affiliated and non-affiliated members, did it not? A. At that meeting?

Q. No, I say Kuykendal, the Kuykendal association had affiliated members as well as independent members? A. Yes, sir.

Q. And the Myers association is composed entirely of independent exhibitors? A. I believe so, sir.

Abraham Montague—By Defendant—Cross

Q. But you have been active in that better relations between exhibitors and distributors personally, have you not, Mr. Montague? A. I have, sir.

Q. And Mr. Rogers of Metro? A. Yes, sir, and Mr. Depinet of RKO and Mr. Sears of Warner Bros. at that time.

Q. That is before he joined United Artists? A. That is right, sir.

Q. He never attended after he joined United Artists, is that right? A. To the best of my opinion, yes, he never attended.

(1791)

Q. So these groups met and discussed both blocks of five and the old system of selling, isn't that the fact? A. Yes, sir.

Q. And as I understood your testimony, each of the exhibitor groups were demanding a return to the old system of selling, isn't that right? A. Arguing for a return to the old system of selling.

Q. Rather than sell in blocks of five? A. In blocks of five, yes, sir.

Q. Did this group or either of them or both of them have a little squawk about having to buy pictures on percentage? A. Exhibitors have been more or less squawking about that ever since percentage was first brought up, I believe.

Q. And also the right to eliminate pictures. Wasn't that the second big squawk? A. Yes, that has been a bone of contention for many years, sir.

Q. So when you talked about your selective contracts, what you are trying to do is to meet by selectivity or right to eliminate the squawks of the exhibitors on the pictures they did not want to play? A. Yes, sir, as best we can.

Q. Now, when you told their Honors this morning that you averaged 32 pictures across the country, you, Columbia, would commit your entire program to an exhibitor and give

(1792)

him the right to eliminate, isn't that it? A. Correct.

Abraham Montague—By Defendant—Cross

Q. So as to the pictures he eliminated, as far as he was concerned, you assumed the full risk of loss in those pictures, isn't that right? A. Correct.

Q. Now, have you ever heard of any exhibitors in any of these meetings asking to continue the policy of selling in blocks or five? A. No, sir.

Q. Quite the contrary? A. Quite the contrary.

Q. Now, you are fairly familiar with the method of selling used by United Artists, are you not? A. Yes; I would say that I am reasonably familiar with it.

Q. You used to be a customer of United Artists years ago, did you not, Mr. Montague? A. Yes, sir.

Q. And you used to buy their pictures? A. Yes, sir.

Q. When you were an exhibitor? A. That is correct.

Q. And they sell pictures one at a time, is that a fact? A. They sold pictures in those days one at a time. And if there happened to be two that may have been released, I would try to buy two.

Q. But they sold them individually on individual contracts? A. Yes.

Mr. Wright: Aren't you going to have a witness of your own?

Mr. Raftery: I don't know.

Judge Hand: You are doing very well with this (1793) one.

Q. And they continued selling pictures individually for a great many years? A. I beg your pardon, sir?

Q. All through the years; isn't that a fact? A. I understand they continued to sell pictures individually.

Q. And are you familiar with the manner and method, generally, used by Universal in selling, are you not? A. Yes, sir.

Abraham Montague—By Defendant—Cross

Q. And they sell pictures in groups, don't they? A. Yes, sir, as we do.

Mr. Wright: If the Court is going to regard this as competent evidence of sales methods of these other people, we object to it. I do not think he is in a position to state what United Artists does with its pictures, how it sells, or Universal either.

Judge Hand: Overruled.

Q. You are in competition with both United Artists and Universal? A. In direct competition, sir.

Q. Now, Mr. Montague, I did not see those charts you put in, but I presume Boston was somewhere included in those fancy paintings? A. Yes, sir, they were included, sir.

Q. And for a great many years you sold your pictures first-run for exhibition in the Orpheum and the State theatres in Boston, did you not? A. We still do, sir.

Q. And you still do? A. Yes.

(1794)

Q. But you were not able to get them all played there, were you? A. No, sir.

Q. Loew's had their own product in those theatres, didn't they? A. They played their own pictures too in those theatres.

Q. And United Artists used to play in those theatres? A. Yes, sir.

Q. So between United Artists and Columbia and Loew's there was a scramble for the playing time of those theatres, was there not? A. Quite a scramble, sir.

Q. And in this present lush market we are in, bottlenecks have developed up there in the past couple of years, have they not? A. As they have in many other places.

Q. In many other cities? A. Yes.

Q. Now, when a situation like that develops, what do you do? A. Well, if we can't get our picture released fast enough

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and we think there is a possibility of selling that particular picture that we need an immediate release on, we are very apt to go to the Loew organization and ask them to give up that picture from their contract and try to find another theatre, or do find another theatre.

Q. Well, up in Boston there was a theatre called the Trans-Lux Theatre, was there not, Mr. Montague? A. Yes.

Q. And it is still up there? A. Yes.

(1795)

Q. And a very good location? A. Excellent location in my opinion.

Q. And not a large seating capacity? A. Quite a small seating capacity.

Q. And when the bottleneck developed you played pictures in the Trans-Lux Theatre? A. We have been known to play pictures in the Trans-Lux Theatre.

Q. And good pictures?

Judge Bright: What do you mean by a bottleneck?

The Witness: Well, if we have three or four pictures waiting for release in the City of Boston, and our account, Loew's State and Orpheum theatres have a lot of pictures that they have not played that have been released before we released ours, that means we must wait our turn, at least, and our turn may not come for three or four or five months; and in that case we term that a bottleneck; and then we go and try to get them off the Loew's contract and try to find another theatre for them. That is so the subsequent-run theatres can get more of a regular play of our product.

Q. And that is the same reason the Tremont and the Majestic theatres, legitimate theatres in Boston, in the last couple of years have been converted into first-run motion picture theatres? A. Yes, sir.

Abraham Montague—By Defendant—Cross

(1796)

Q. And isn't your real reason for that, Mr. Montague, for that, selfishly to get your turn-over; isn't that right? A. Yes, sir.

Q. And secondly to take care of the subsequent runs who need pictures? A. Who need and whom we have an obligation to deliver pictures to.

Q. In other words, a picture will go into the Orpheum Theatre now in Boston and play three or four weeks where formerly it played one week; isn't that a fact? A. Yes. They played a great many more pictures for one week and a lot less pictures in the past for longer than one week than they do now.

Q. And the neighborhoods still change the pictures once or twice or even three or seven times a week, do they not? A. Yes, sir.

Q. And Boston is where the double bill policy was born, is it not? A. It has been so said.

Q. By exhibitors like you and other exhibitors? A. Yes, from Boston and all of the rest of the country too.

Q. And in those situations in the neighborhoods they need far more pictures per week than are being played downtown Boston first-run under the old setup; I mean without the Trans-Lux, the Tremont and the Majestic? A. Yes, they would not have enough clearance to the few theatres as they have now with the many theatres playing first-run.

(1797)

Q. Hasn't the situation even gotten to a point in the last couple of years where they are reshewing your pictures to take care of the second features in these double bill houses? A. Yes, sir; that was one of the reasons.

Q. And you have talked a great deal, Mr. Montague, about adjustments. Do you have much trouble with the towel on those top pictures we talked about? A. No, we have very little trouble with the top pictures; practically none at all.

Abraham Montague—By Defendant—Cross

Q. And it is these low bracket pictures, again, that are subject to adjustment, even over and above the amount of selectivity you allow these exhibitors? A. Yes, sir.

Q. So as Judge Hand remarked, even though your contract is signed, it calls for an obligation to play, say 32 out of 42, you may end up with a much less play-off than 32 out of 42? A. Yes, and a different price on some of the pictures than specified on the contract.

Q. Now, yesterday Mr. Kupper told us about these little towns where you have only one theatre. Do you have much trouble getting into those towns? A. They are the hardest towns to sell.

Q. In other words, that man has a complete monopoly in his own town in exhibition, is that right? A. Absolutely complete, sir.

Q. And he can leave you out any time he feels like? A. (1798)

Yes; and feels like it quite a bit.

Q. Now, you may run into that in the suburban and neighborhood runs in the city? A. Yes.

Q. Where you have one theatre in the neighborhood? A. Yes, sir.

Q. And you are left out of those situations quite frequently, are you not? A. Quite frequently.

Q. And, again, to go back to the larger towns, do you have trouble in this present market getting day and date from coast to coast? A. Very difficult.

Q. Well, let us take a picture like *Kiss and Tell* that is opening at the Capitol Theatre. Have you that dated pretty well across the country? A. No, we have not.

Q. I am talking only of first-runs. A. No, we have not got it dated. We are dating it very slowly because we think the picture will benefit by slow dating. By word of mouth it will spread as to the type of business the picture is doing.

Abraham Montague—By Defendant—Cross

Q. Let us assume that the picture is one you desire to get dated quickly. Have you been able in the present market to get quick datings across the country? A. No, we have not been able.

Q. You have none of these theatres to date them in for you? A. Yes, sir.

Q. Is that right? A. I beg pardon?
(1799)

Q. You have no theatres of your own to date them in? A. None whatsoever.

Q. So you take the market as you find it and try to get the most dates you can on your first runs and as soon as you can? A. Yes, sir.

Q. And that applies equally to the subsequent runs that follow down the line? A. Yes, sir.

Q. Now, these subsequent-run theatres have been very prosperous, have they not, during the past ten years? A. They have seemed to grow considerably in prosperity. They have been more successful year after year. In such situations as we play our pictures on percentage we naturally get a good feel of that group, because we participated in the group, and we have found over the period of the last few years we have been able to get increased prices on the so-called flat buy, from which we have a right to assume that the theatre has improved its business.

Mr. Raftery: That is all.

Mr. Seymour: I have a few questions.

Cross Examination by Mr. Seymour:

Q. I wish you would clear up for us just what you meant when you testified earlier that you considered certain theatres affiliated with major producers, and in particular reference to those charts which your counsel put in, will you

Abraham Montague—By Defendant—Cross

(1800)

define for us what you mean by an affiliated theatre? A. An affiliated theatre in our description is a theatre that to the best of our knowledge is in some way associated with a producer and distributor.

Q. That is in some way associated with a particular producer or distributor? A. Particular, yes, sir.

Q. You do not mean that it is associated with all the producers who have interests in theatres? A. Definitely not.

Q. Or with more than one of them? A. No.

Q. And so when in these charts or graphs that have been put in there are theatres described as affiliated, that is just the sum total of the theatres to which you sell which severally are affiliated with a particular producer, is that right? A. Yes, sir, severally.

Q. Now, for example, in those graphs that you put in, did you include the theatres which are operated by the Butterfield Theatre Company? A. We considered Butterfield in our listing as an independent, not an affiliated.

Q. Not an affiliated? A. No.

Mr. Seymour: I wonder if that clears up the question that was asked from the bench earlier about that matter.

Judge Hand: I think so. I think there was a misunderstanding between the witness and his counsel.

(1801)

Mr. Raftery: Or a misunderstanding between the witness and the charts. That is the reason I haven't any charts.

Q. Now, has the cost of your top pictures increased in the last ten years, Mr. Montague? A. Yes, materially.

Q. Can you give us some idea of what that increase has been? A. In the last ten years?

Abraham Montague—By Defendant—Cross

Q. Yes. A. Well, a top picture ten years ago would have cost in the neighborhood of approximately \$400,000. A top picture today has cost us as much, with its prints and advertising, as two million three to two million four.

Q. Are you familiar with the negotiations which the sales department conducts with theatre companies in which Paramount has some interest?

The Witness: I did not get the first part of your question.

Q. (read.) A. Yes.

Q. And have you from time to time participated in negotiations with one or more of those companies? A. With some of them, yes, sir.

Q. Can you tell us where those negotiations are conducted? A. Well, in the localities in which the theatres are operated.

Q. And are they conducted by representatives of the exchanges or of the sales department at the principal office of (1802).

those theatre-operating companies? A. Yes, sir.

Q. They are not conducted with the Paramount theatre department? A. No, sir.

Q. Now, so far as you are concerned, or the Columbia sales department, is there any relationship whatever between the negotiations or licenses granted to one of those theatre-operating companies, such as Minnesota Amusement Company, and the negotiations or licenses for Columbia pictures to the theatres operated by another one of those companies, such as M. & P. in New England? A. No; the type of deals are quite different.

Q. Now, do you license Columbia pictures to all the theatre-operating companies or theatres operated by all the theatre-operating companies in which Paramount has an interest? A. No, sir.

Abraham Montague—By Defendant—Cross

Q. With respect to a particular theatre-operating company, do you license Columbia Pictures to all the theatres operated by that company? A. In some cases I think we do. Not in all the theatres. If those theatres are in competition with one another we would not lease our films in all.

Q. And in some cases you do not license to all the theatres, isn't that so? A. That is right, sir.

Q. And in many cases you license to competitors of the theatres operated by one or more of those operating companies; (1803)

isn't that so? A. Quite true, sir. In New England I believe we only sell one or two situations to M. & P. where they have competition. We sell the independent so-called competition.

Q. And that is so elsewhere in the country? A. In many situations.

Q. Now, your counsel has asked you a number of questions about selling in blocks of five. Before the decree was entered and before your company concluded not to participate, were you generally familiar with the source from which the various matters covered by the consent decree came? A. Yes, generally speaking, I think I am acquainted with it.

Q. Am I correct in believing that the provision for selling in blocks of five was a suggestion of the Attorney General?

Mr. Wright: If the Court please, that is objectionable, where any particular thing came from. I think the decree speaks for itself as to what is in it. I do not see how it has the slightest relevance who suggested what.

Judge Hand: I will sustain the objection.

Mr. Seymour: That is all.

Judge Hand: Any more questions before the Government cross-examines?

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(1804)

Mr. Wright: Yes, we will have—

Judge Hand: I mean before.

(No response.)

Judge Hand: All right, we shall adjourn until

2.15.

Mr. Seymour: Would your Honors give me a five-minute leeway, to come back at 2.20? I have to preside at a meeting.

Judge Hand: Yes. Somebody can take your place.

(Recess to 2.15 p.m.)

(1805)

AFTERNOON SESSION

Mr. Frohlich: Before proceeding, your Honors, may I ask Mr. Wright to stipulate with me that the witness, if asked, would answer in the same strain as the other witnesses, negating the charges of conspiracy?

Mr. Wright: That is so stipulated.

Mr. Frohlich: Your witness.

ABRAHAM MONTAGUE resumed the stand.

Cross-Examination by Mr. Caskey:

Q. Mr. Montague, with whom do you negotiate film licenses for Randforce Amusement Company? A. Sam Rinzler.

Q. Do you negotiate with anyone at Twentieth Century-Fox for Randforce? A. No, sir.

Abraham Montague—By Defendant—Cross

Q. Do you negotiate with anyone at RKO for Randforce?

A. No, sir.

Q. Do you regard Randforce an affiliate or independent?

A. We consider Randforce an independent.

Q. Is the same true of the Skouras Theatres Corporation which operate in Metropolitan New York? A. We consider Skouras an independent.

Q. Do you know Si Fabian? A. Very well, sir.

Q. How long have you known him? A. Ever since I have been in New York, 12 or 13 years.

(1806)

Q. He operates theatres in Albany? A. Yes, sir.

Q. And, according to the testimony, now in Norfolk and Richmond, Virginia? A. Yes, sir.

Q. Is he affiliated with anyone? A. To the best of my knowledge, definitely, no. We consider him an independent.

Q. And he acts independently of everyone else? A. Absolutely.

Mr. Caskey: That is all. Thank you, Mr. Wright.

Cross-Examination by Mr. Wright:

Q. On this question of Mr. Fabian's status: You consider him an independent in Brooklyn, where he operates for the RKO-Paramount-Fox pool? A. We consider him as an independent, Mr. Wright.

Q. I mean, everywhere that he operates, regardless of whose theatres he is operating? A. We are not interested in whose theatres. We list him as an independent because he acts entirely independent of any so-called affiliate.

Q. I just wanted it clear that you regarded Mr. Fabian as an independent even in those situations where he is operating theatres which are owned by one or more of these defendants or their subsidiaries upon a basis where they share in the profits of the operation, is that right? A. We

Abraham Montague—By Defendant—Cross

understand there is a pool in Brooklyn, for which Mr. Fabian is the operator.

Q. Can you answer the question? A. I beg your pardon? (1807)

Mr. Wright: Will you read the question?

(Question read.)

A. We consider him an independent, sir, in such situations.

Q. You do not, of course, sell Columbia pictures to everybody yourself, do you? A. No, sir.

Q. You have a sales organization. Can you just tell us what it consists of? A. We have a sales organization that consists of approximately 101 salesmen, 31 branch managers and eight district managers.

Q. And then, what is above the district managers? A. Then we have certain home office personnel that act as what we call circuit contacts and bigger contacts, which some of these men go out into the field and help negotiate and do negotiate.

Q. And who and what are they? Can you give us their names and titles? A. Yes; there is a Mr. Jackter, who is the assistant sales manager; Mr. Weinberg, who is one of those who goes out from the home office and acts and negotiates for us; and a Mr. Louis Astor; also a Mr. Max Weisfeldt.

Q. Those men are all in New York, is that right? A. Those men reside in New York and are part of the home office.

Q. The district managers—are they in the field here (1808) in New York? A. They are in the field. One of them is in New York in the New York branch.

Q. The others are in the field or in the areas occupied by the exchanges that they supervise? A. Yes, sir.

Abraham Montague—By Defendant—Cross

Q. And your solicitation of contracts, as far as independent accounts, is handled principally by the salesmen and branch managers in the first instance? A. Some of the independent contracts are handled by them. I have also been negotiating with many of the independents throughout the United States.

Q. Well, the ordinary routine in selling the independent account is that the salesman takes an application from them; then it goes in to the branch manager? A. In some cases the branch manager; many cases the district manager; and in some cases the home office contacts them.

Q. Well, whenever the solicitation is made and then the application is signed, then it goes first to the branch for approval or rejection? A. It goes first to the branch manager, yes, sir.

Q. And then to the district manager? A. In some cases to the district manager.

Q. For approval or rejection? A. For his opinion or approval.

Q. And then it comes to New York for a final decision before it is approved? A. Yes, sir.

(1809)

Q. And when the contract is approved some New York official executes it and returns it to the exhibitor, is that right? A. Returns it to the branch.

Q. Or returns it to the branch; and then the branch, I suppose, delivers it to the exhibitor in question? A. Yes, sir. It mails it probably in most cases.

Q. This method of selling that you use that is described as season block booking—you say you sell your pictures today pretty much as you have for the last ten years as far as season blocks are concerned? A. Yes, sir.

Q. And in addition to season blocks, of course, you also sometimes make franchises which extend for more than a season? A. Yes, sir.

Q. And you still make those today? A. Yes, sir.

Abraham Montague—By Defendant—Cross

Q. And in this process of selling your features, westerns, shorts, in fact, everything you have to offer, the effort of the salesman or individual who negotiates the account is always to include as much of the product as you have in the contract; isn't that right? A. Correct, sir.

Q. And, of course, as to what particular negotiations go on between a salesman or branch manager and any particular exhibitor, I suppose that is something that does not come to your attention? A. Well, not too much, sir. I have general knowledge of the type of discussion that may go on. (1810)

Q. Well, the type of discussion that may go on and does go on is that it is sometimes indirectly suggested to the account that if he wants certain of the product he had better take some of the other, isn't that right? A. The conversation that goes on as to that point between the salesman and the manager—the salesman, you understand, Mr. Wright, is always very, very anxious to close a deal with a theatre. Once he has that closed up much of the responsibility is off of him as far as the selling of it goes; but not as far as the liquidating of the contract; that he must follow up. Now, very often the salesman may suggest to the branch manager that a certain portion of the program which the exhibitor offers to buy, he feels it is a fair representation in that house, and he suggests to the manager to take it; and the manager may differ with his opinion, or he may accede to it and say, "All right, let us close that contract."

Q. I am afraid you misunderstood the question. I was not referring to conversations between the salesman and the manager. I was referring to such negotiations or conversations that either the salesman or the manager may have with the independent exhibitor. A. I have a general knowledge of what that might be.

Q. And I say in the course of those conversations and negotiations it is sometimes suggested to the exhibitor, is it

Abraham Montague—By Defendant—Cross

(1811)

not, either directly or indirectly, that if he wants to buy certain of the product it would be advisable for him to buy some of the other which may not appear to him to be so desirable, because he may not have such an acute need for it; is that right? A. That is quite true. The exhibitor may want to buy less and we may want to sell more. He may want to buy just two or three pictures of the top, and we may think he has room in his theatre and we are seeking representation for more.

Judge Goddard: Suppose he says he won't take more than three or four, do you turn him down altogether?

The Witness: In some cases, yes, sir. It would depend on whether we had opposition or not. If we had some place that we thought we could do better by going across the street or in the adjacent town, or some place, the chances are we would go and try to sell that one, or more of it to the other fellow. If we did not have any opposition we would still try to talk him up to take some more film than just the top, because we would not afford to sell him just the top film.

Judge Goddard: Suppose you had none who would take them, and he would not take more than seven, or four or five, would he get them or not?

The Witness: In rare cases, yes. In general cases I would say no, sir.

(1812)

By Mr. Wright:

Q. Now, as far as what you term blind selling is concerned, you pursue the same practice there today that you have for the past ten years? A. Well, if you want to use

Abraham Montague—By Defendant—Cross

that term "blind selling", we do not agree with it that it is blind, Mr. Wright.

Q. What you would do is, you, at the time you have these negotiations for a season's deal, you tell the exhibitor the approximate number and kind of pictures that you think you are going to be able to release that year, isn't that right? A. Yes; we let out as much knowledge of the picture as we have.

Q. And he does not get any assurance when he signs the contract even as to how many you are going to be able to deliver, is that right? A. Yes, it may be we will not be able to deliver them all. Occasionally we deliver more. He bases his contract and the method under which he negotiates a contract with us on past performances. That is the basis. Therefore we say it is not blind selling. It is a continuance of an actual knowledge that a man has of our product and the kind of pictures we make.

Q. I understand. Well, of course, he considers your past performance. That is about the only thing he really has to go by in estimating what he is going to get under your contract for the ensuing year; that is right, isn't it? A. Yes. (1813)

We make a great deal of past performance. We are willing to have that past performance reviewed and so sell against it.

Q. You do not even name the title of the features in the deal that he makes, do you? A. In the contract we do not.

Q. And he does not even know with any degree of certainty how many are going to have which particular stars in them either, does he? A. Not on all of them, sir.

Judge Hand: What do you agree to do, to give him your output?

The Witness: That is right, sir; we agree to give him all or any part of it that he may buy and we complete negotiations for.

Abraham Montague—By Defendant—Cross

Q. Now, that again is the method of selling which you generally pursue with the smaller independent accounts, isn't that right? A. It is the same method whether they be small or big, sir.

Q. Well, as a matter of fact, in selling your so-called key runs, those people have never committed themselves to play any one of your pictures without having seen it first, isn't that a fact? A. That is not a fact.

Q. When you sell those runs before they book any of your pictures actually in there for an exhibition, they see it, don't they? A. After they have bought it.

(1814)

Q. Well, let us take one of these concrete situations where there is some first-run account that uses perhaps five or six of your season's output for first-run exhibition in the course of the year— A. Are you talking about the Music Hall, sir?

Q. No, I am not talking about the Music Hall. A. You will find it very difficult to find any more.

Q. Well, you have some, let us say, that will not use more than eight or ten or 12 of your entire output for first-run exhibition in a particular large city, isn't that right? A. There would be some of them but not too many.

Q. Well, as to those, you make a deal for the season's product which simply gives them the privilege of selecting from your output eight, 10 or 12, or some other specified number that they think will be suitable for first-run exhibition in their theatres; isn't that right? A. We would give them the same rights we would give any other selective contract; no more and no less.

Q. Well, the amount of selectivity you give always depends, does it not, on the particular bargaining position of the fellow that you make the deal with; isn't that right? A. It always depends on the bargaining position of the fellow we make the deal with.

Abraham Montague—By Defendant—Cross

Q. Now, you have a situation where the first-run exhibitor has enough product to play so that he does not need more than 8 or 10 of your pictures to exhibit on first-run in his theatres; you know of such situations as that don't you? (1814a)

A. Where I know there is competition I do not sell them if I can do better.

(1815)

Q. In those situations where you make a deal of that kind, the ten or twelve that are actually used and exhibited are not now and never were actually elected and dated in until the exhibitor had had a chance to see them, isn't that right? A. Mr. Wright, your question is very general. If you could name one particular theatre or group of theatres, I could give you your answers very much clearer. You are generalizing and it is very hard for me to answer.

Q. Can you think of a situation offhand? Let me take your Music Hall. A. Yes.

Q. Which uses five or six pictures selected from your annual output, or maybe three or four. None of those pictures is ever actually dated and committed, put into the Music Hall, until after the operator of the Music Hall has seen the picture, isn't that right? A. Mr. Wright, when you get to the Music Hall, I would like to explain to you that the Music Hall contract does not deal with pictures, sir. It deals with a number of weeks the Music Hall commits themselves to play against the contract. He also agrees in that contract that if he does not fill out those weeks, that he pays for the pictures at a certain stipulated price.

Q. You sell him so many weeks of playing time? A. I beg your pardon?

Q. You sell him so many weeks of playing time? A. (1816)

Correct.

Abraham Montague—By Defendant—Cross

Q. The selection of the pictures that are actually used, if any, to fill that playing time, is not made now and it never has been until after the Music Hall has seen the picture in question, isn't that right? A. The contract is made prior even to the time we produce the pictures. The play-off of the contract, as far as the Music Hall is concerned, is based on whether or not he likes the picture. If he does, he will give playing time. If not, there is a cost to him, if he passes it up and doesn't fill out the 12 weeks of his contract.

Q. Exactly. A. Yes.

Q. But as to what is actually played, that is never determined until after he has seen the picture? A. After the sale is made and after he has seen the picture, yes, sir.

Q. And that situation is not unusual, is it, that is, where you contract with a first-run account for a certain amount of playing time; you do that in other so-called key situations? A. No. Very rare. I could not offhanded think of another situation that we sold on playing time, sir.

Q. Give me a situation, if you can think of one, where your first-run exhibitor that you sell is only committed to actually use the ten or twelve of your features. A. I cannot (1817)

remember one offhanded. I would have to refer to my records, sir.

Q. How about 15 or 20, then? A. Yes, I think we could remember 15 or 20.

Q. Could you give me one of those? A. Well, for instance, I can remember that Loew's Theatre in Boston, trusting to my memory, sir, is approximately 25. They commit themselves to play 25 of our pictures in two theatres day and date in the city of Boston.

Q. As to those pictures that actually go in there, those are never selected, are they, until after Loew has actually seen the finished product? A. Well, they couldn't date them before I finished it and as soon as I get a print in New York

Abraham Montague—By Defendant—Cross

I am ready to screen it, and they have screening days over there and we send the picture and they look at it.

Q. And they screen it before they date it or put it in? A. Most of the key theatres in the United States do the same thing.

Q. That has always been true, not only today but in the past? A. Yes, sir. The key theatres—

Q. When you sold that kind of account? A. The key theatres in the United States usually see the picture before they book it but they have already bought it.

Q. You mean they have already made a contract which (1818) permits them to select a certain number from all released, is that not right? A. Correct, but they must run those pictures that are on the contract.

Q. That is, they must— A. Or pay for them.

Q. —either run or pay for a certain commitment? A. That is right.

Judge Hand: Does that mean all?

The Witness: If it be all, or, if it be part. In the case of metropolitan New York, it is all, sir.

Q. Ordinarily the only situation where the selection would not be made from all subjects is where you have a split of your first-run, isn't that right? A. Mr. Wright, when I said all—you spoke of Loew's in Boston; I was now speaking of Loew's Metropolitan Circuit in New York—they buy all, they play all.

Q. Yes, but I think Judge Hand's question referred to what the selection was made from in any case; whether they select five, ten or fifteen, the selection is made from your entire season's product, isn't that right? A. It is made with the stipulation, Mr. Wright, they only have the right of elimination of a certain number of pictures that we designate

Abraham Montague—By Defendant—Cross

from the bottom of our program! There are all kinds of stipulations in these various contracts as to how they can eliminate, and that is why I would like to get down to a particular (1819)

theatre. Then I can answer it intelligently.

Q. In selling your accounts, generally the principal thing, or, particularly, your independent exhibitor, that he is interested in is the amount of film rental that he has to pay, isn't that right? A. Yes, all of them are interested in the amount of film rental they have got to pay. It is of great interest to them.

Q. Of course, what you attempt to do is to get the most film rental you can out of them for everything you have for sale? A. Within reason.

Q. And now and heretofore whenever you had a really top-notch picture that you knew would stand on its own feet, you have been accustomed to sell that picture individually under individual contracts, have you, not? A. As a custom, no. It has happened twice in the history of Columbia.

Q. That picture "It Happened One Night," how was that sold? A. "It Happened" was sold in the group.

Q. You did not make individual contracts for that? A. No, sir, that was sold as part of a program and delivered as part of the program.

Q. Didn't your contract with Mr. Capra provide that you had to have—to sell that individually and have individual approval? A. No, sir.

Q. That happened with the later pictures that Capra (1820)

made for you? A. It happened with one picture that Capra made later.

Q. Which was that? A. Lost Horizon.

Q. You sold that individually? A. Collective, in contract and out of the contract. Some of the exhibitors bought

Abraham Montague—By Defendant—Cross

it as part of the program, some of the exhibitors bought it separate and apart from the program.

Q. You have had what you call so-called specials, haven't you? A. Yes, but most of them have been in the program.

Q. What do you mean when you say "in the program"? A. In the contract that we make with the exhibitor before we produce our pictures, our program is those pictures that we make during X season, starting as of one date and finishing as of another.

Q. You have had some specials that you make a separate contract for with each—a contract separate and apart from the one you make for your season's product, isn't that right?

A. We have had pictures that we have sold on a separate contract.

Q. Those pictures that you have sold on separate contract have always been outstanding box office attractions, isn't that right? A. Yes, in our opinion they have been.

Q. You have got as high film rentals for those pictures that you got for any you had? A. As high and in some (1821)

cases higher.

Q. I believe you said that at least in selling independents you sold most of your product on flat rental? A. Most of the independents buy on flat rental from us.

Q. But you always try to have some pictures which everybody buys on percentage, isn't that right? A. Only a very recent picture where we have insisted that that be bought on some sort of our participation.

Q. And the purpose of getting the independent in every case to license at least one picture on percentage is, I suppose, to give you a more accurate picture of what kind of business he can do than you could get any other way, isn't that right? A. Oh yes, I get a much more accurate picture of it that way.

Abraham Montague—By Defendant—Cross

Q. How much film rental you can ultimately get out of him, I suppose, of course depends to some extent on his operating expenses and what he can take in? A. Well, in selling this picture we did not go into operating expense too definitely.

Q. And when you do sell those pictures on percentage you, of course, have the right to audit his books and to check the pictures? A. We have the right under the contract—it gives us a right of checking and auditing.

Q. And you do check his pictures, is that right? A. In some cases we do. In many cases we do not.

(1822)

Q. When you do, you use an agency called Confidential Reports, Inc.? A. We do now use that agency, yes, sir.

Q. That is, for how long have you been using it? A. Oh, since, I believe, last April or May.

Q. And that is an agency that was formed by your company and some of the other defendants in this case? A. Correct.

Q. Who were the other defendants?

Mr. Rafferty: If your Honors please, there is nothing in the pleadings, there is nothing in the trial brief about that. Is Mr. Wright making an issue of the right to police these accounts? We could go on forever examining on this thing.

Judge Hand: Overruled.

Mr. Wright: What is your answer?

A. RKO, Paramount, Universal, United Artists and Columbia.

Q. And you have an agreement, do you, with those other defendants for the joint use of this particular corporation in checking pictures? A. We have an arrangement for this checking corporation to check such pictures as we want checked.

Mr. Wright: Will you read the question?

Abraham Montague—By Defendant—Cross

Q. (Read.) A. I don't know whether you would call it an agreement with the other four or whether we call it an (1823)

agreement with the checking service itself.

Q. Anyway, you five— A. We do not have an agreement with the other four. We have an agreement with Confidential Reports.

Q. You five are the sole owners of Confidential Reports, isn't that right? A. That is correct, sir.

Q. What the independent actually wants in buying film, in addition to the lowest film rental; lowest terms which enable him to pay the lowest film rental, I suppose, is the highest degree of selectivity that he can bargain with you for, isn't that right? A. Some of them, Mr. Wright, do not bargain for selectivity at all. They want all that I can possibly give them. Some of them would like to pay less than we ask for and usually a compromise is brought about whereby we will have a meeting of the minds. You must understand, Mr. Wright, that the majority of these accounts we have been selling for years and years, ten, twelve years, and they understand us and we understand their requirements and, consequently, there is a meeting of the minds over a period of years of the development of the account, they with us and we with them.

Q. Of course, where he is short of pictures and is badly in need of pictures, there is no problem, you sell him all, but I am talking about the situations where he has some kind of choice as to product. Then I take it the thing that he (1824)

tries to get from you is the privilege of selecting and exhibiting the best pictures that you have got rather than the poorest ones. He wants to eliminate the bad ones and to play only the good ones? A. No, that does not necessarily be right. If you will tell me of a theatre, particular theatre or theatres, I will be glad to answer you directly on it, but you are generalizing again, and these situations change

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all over the United States. You have different problems—you might say a different problem with every account you sell and each one is treated as to that problem.

Q. What did you mean by the generalization that Mr. Raftery put in your mouth, that you assumed the risk of loss when you deal with these independents? What did that mean? A. I assume that Mr. Raftery meant that we produce 44 pictures and if a man buys 32 or 36 out of our 44, we do not have the advantage of the income from the balance of those pictures because he does not buy them and he doesn't play them.

Q. What you get out of him is a commitment in which agrees to pay you so much for so many pictures, isn't that right? A. Yes.

Q. In each case? A. Yes, sir.

Q. And as far as the failure of those pictures to draw, in box office returns, what you represented to him they (1825)

would at the time you made the deal with him is concerned, the risk of loss is his, not yours? A. The loss would be mine. I created the investment first, sir. I made the picture. If I didn't make it, I would certainly—couldn't lose. I am assuming in making it that he will buy it. If you are speaking of any one account, he may decide not to buy. And in a lot of cases, Mr. Wright, these smaller accounts, if you are referring to smaller accounts, they do much better with some things that you would call a poor picture than they do with some of the pictures that you would think is great entertainment to you. Why, I can take you to hundreds of accounts in this country that do a sensational business with a Western and you give them a picture as great as Song to Remember; if I may call that great, and they flop with it.

Q. Let us take a situation where he has bought all of your product and he has agreed to pay so much for it in dollars and cents, so much per picture, and if the pictures

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that he plays or that you have sold him at those prices do not happen to be as good as he and you thought they were going to be at the time you made the deal with him, he is the one who is stuck on the contract; isn't he? A. If you want to call that stuck, but you will find out, if you will examine the records that he comes around and asks for a reduction and in the vast majority of them, he gets it. (1826)

Q. Whether or not, of course, he gets a reduction depends on such good will as you may entertain for him, does it not? A. Well, if he is a responsible man, that has been doing business with us for years and so-called played ball with us and we with him, we believed him for years, and we believe him then, that it is necessary to help him.

Q. You don't hesitate to wave his contract in his face at the time he asks for it and tell him you are doing him a substantial favor by letting him off the hook? A. We don't wave the contract. It is seldom that a contract, after made, is ever taken out of the file and re-examined. It is rare.

Q. On this tabulation that was offered here as Exhibit C-6, can you tell me what, if anything, you had to do with preparing the table or the material that is in here? A. I was requested by counsel to prepare such a list. I had such a list prepared by those in our organization who had such information. Mr. Rose, who is sitting in court here, had quite a lot to do with the preparation of this.

Q. But this was prepared under your direction? A. Yes, sir.

Q. I notice in the last two columns, or before you get to the last two columns, you have a letter "I" or a letter "A". (1827)

That indicates whether the account is what you call independent or affiliated?

Mr. Proskauer: It was my understanding, your Honors, that the last two columns were withdrawn from the exhibit on our objection. I am not sure

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whether what Mr. Wright is reading is from that part or not.

Judge Hand: Is it?

Mr. Frohlich: They have been withdrawn. The last two columns are withdrawn and they haven't been physically X'd out or inked out, but they are not part of this exhibit.

Judge Bright: The column marked with the "I" and "A" is not part of the last two columns?

Mr. Frohlich: No, they aren't. May I show the witness a copy of this exhibit while he is being cross-examined?

Judge Bright: That is the column with the blue circles.

Mr. Frohlich: Yes, that is the first column, that is right. That stays in.

Q. As to the column which is marked "Closed" and which has X opposite the town, under the column "Closed", can you tell me just what was done in that connection, that is, what that X was supposed to represent at the time the table was prepared?

(1828)

Mr. Proskauer: Your Honor, I object to that. Those two columns marked "Closed" were distinctly excluded from the exhibit on our objection.

Mr. Frohlich: And I take the same objection, your Honor.

Judge Hand: Sustained.

Mr. Wright: If the Court please, I submit that if I can establish what is represented here, and if what is represented is relevant, I am entitled to offer it myself and have it in evidence. It is wholly a question of finding out what was actually done and what this means, as I see it.

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Judge Hand: I would drop that. I don't see why you want to do it that way. He has only offered a certain part. His exhibit does not include those columns.

Mr. Wright: That is quite right. His exhibit as it is now in evidence does not include the data shown in the last two columns. I wish to establish what this data shows in the last two columns. And if I can satisfactorily establish it and demonstrate to your Honors that it is relevant, I would then offer it and expect it to be received. We are dealing with facts here.

Judge Hand: Let me hear what your question is.

(Question read.)

Judge Hand: If you want to show that these towns that are closed are not closed, you may by your cross-examination, but not by marks on the exhibit that are not in evidence at all.

(1829)

Q. I take it, Mr. Montague, at the time the Exhibit C-8 was prepared, there was some discussion between you and counsel, or you and the people who got it up, as to what were referred to as closed situations, and what were referred to as competitive situations, is that right? A. To the best of my knowledge, Mr. Wright, counsel proposed that I draw such a list, and discussed it with me—

Mr Proskauer: Will you keep your voice up, please.
The Witness: Pardon me.

A. (Continuing) Proposed that we compile such a list, and this list was turned over to some of the clerks that handled—I believe it was turned over to those clerks that handled our possibility list; and on that possibility list there is a notation

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as to what we call independent and what we call affiliated and what we call closed and what we call open.

Q. That possibility list includes all the towns in the United States, or just those that are on this Exhibit C-6?

A. It includes all the towns in the United States, sir, and all the theatres that we have on record.

Q. So in preparing this table you simply took off the possibility list the names of the cities with more than 25,000 population? A. I assume so, yes, sir.

Q. And then also the name of the exhibitor? A. Yes, sir. (1830)

Q. As it appears on your list? A. Yes, sir.

Mr. Proskauer: I object to this an independent evidence against us. It may be perfectly proper cross-examination.

Judge Hand: Overruled.

Mr. Proskauer: The difficulty, of course, is, if I may be practical for just a moment, there is a confusion between the witness and ourselves which has developed here this morning as to what were closed towns and what were not closed towns in the terminology. I think a great deal of time might be saved if we had a talk with Mr. Wright about this document out of court in an endeavor to ascertain what the facts are.

Mr. Wright: I would prefer to talk with the witness about it in court.

The Court: All right. I overruled the objection.

Mr. Wright: Will you read the last question and answer?

(Last question and answer read.)

Q. And then the letter "I" was inserted where your possibility list showed the account that you were selling to be independent, and the letter "A" was put in there where the

Abraham Montague—By Defendant—Cross

accounts you were selling was an affiliated one, is that right?

A. I would assume that is right, Mr. Wright. I am positive as to that.

(1831)

Q. Now calling your attention to the town, Philadelphia, where you have the name Warner under the exhibitor, and the letter A opposite it. Do you recall whether that was a town where you regarded any other exhibitor as a possibility for first-run exhibition there? A. I would call any other exhibitor that had a suitable theatre where my product is available, a possibility for first-run. If my product is not available, it still may be listed as a possibility, but I may not be able to sell them.

Mr. Frohlich: What season, may I ask, Mr. Wright, are you referring to?

Mr. Wright: The top one here is 1936-1937.

Mr. Frohlich: Were you referring to all of them or to the last one?

Mr. Wright: Well, let us take the last one to see where we are, here.

Mr. Frohlich: Have you a copy of that document before you? That is the document and these are the seasons first and last (indicating).

The Witness: Thank you.

Q. You have one of these for each season, is that right?
A. Yes, sir.

Q. You had it prepared for each season? A. Yes, sir.

Q. Now then, in Philadelphia, in the 1944-45 season you
(1832)

had, did you, what you regard as another possible first-run account? A. Are you referring to any particular theatre or theatres, or just a company known as Warner?

Mr. Caskey: I can't hear a word of that.

The Witness: I am sorry.

Abraham Montague—By Defendant—Cross

A. (Continuing) I say, are you referring to any particular theatre or theatres, or to Warner? I see here "Warner." The exhibitor is Warner.

Q. Yes, I understand that. I am asking you whether or not your records as to possible first-run accounts in Philadelphia indicate that there was another possible first-run outlet there?

Mr. Proskauer: This schedule is a schedule of the accounts sold. Are you referring to some other schedule than the one in evidence?

Mr. Wright: I think the question is clear.

Mr. Caskey: I object to that. If you are examining the witness—

Judge Hand: Overruled.

Mr. Caskey: Just a moment, sir, if I may make the objection. He is examining this witness about some document that is up in Columbia's office that is not in court, and trying to get this witness to remember what is on this document not in court, and to state it orally. Now we submit that at the very least we

(1833)

have the right to have the document here in court so that we may cross-examine from it.

Judge Hand: Overruled.

Mr. Wright: Will you read the question?

Q. (Question read.) A. I assume that it would, if you are referring to the possibility list that we have in the home office.

Q. Yes. A. I assume that it would.

Mr. Davis: What do you mean by possibility list?

The Witness: A theatre that runs first-run pictures, and if we are considering first-run possibilities, that first-run theatre, whether we serve it or not, would be on that list.

Abraham Montague—By Defendant—Cross

Q. And that is true if it is actually suitable for first-run exhibition in your opinion, whether or not it is then actually playing first-run, is that right? A. I would not consider it suitable in a comparable way, no, sir. If you are referring to the same theatre that I am in Philadelphia—

Q. I was not referring to any theatre. I was referring to your record. A. I can't remember the record, sir. It is up at 729 Seventh Avenue, and that record has thousands of theatres on it.

Q. Could you produce for us without too much trouble the records which apply to these towns that you have got (1834)

tabulated here in this C-6? A. I imagine we could produce such a record.

Q. Let us say for the 1943-44 season? A. Yes, sir.

Mr. Frohlich: We will produce that.

Q. Now in these exhibits that you identified, which are supposed to chart your first-run accounts in the cities of 25,000 or more, I notice your charts in evidence as C-8 have notations at the bottom which run as follows:

"This chart covers 384 cities excluding the following five in which there was no deal, 14 for which there is no record; 10 which are not in fact separate cities but in fact parts of larger cities."

Now I take it you have the names of the towns that are referred to there? Do you know what they are offhand?

A. No, I don't know offhand, but, as I recall, we must have the names.

Q. But you can supplement what you have here with a list of the towns, the names of the towns that are referred to in the footnotes on each of those charts? A. Yes, sir.

Abraham Montague—By Defendant—Cross

Q. Now, Mr. Montague, in selling these so-called affiliated accounts in the towns over one hundred thousand that you have tabulated in these exhibits here, your Exhibit C-7, can you tell us whether or not you have negotiated in those towns where there is more than one affiliated exhibitor with more than one of those exhibitors during the past ten years? (1835)

A. That question is not quite clear to me, Mr. Wright.

Q. I will try to simplify it. In many of these towns, or in some of these towns, these 92 cities over a hundred thousand population, there are first-run exhibitors which may be affiliated with one or more of the defendants in this suit, isn't that right? **A.** Yes, sir.

Q. And in some of them there may be a first-run which is affiliated with one defendant, and another first-run which is affiliated with another defendant, isn't that right? **A.** Yes, sir.

Q. Now in selling those towns in the situations where there are two or more first-run theatres affiliated with two or more of these defendants, have you had any competitive negotiations for the sale or licensing of your films in those towns first-run as between those affiliated exhibitors? **A.** Occasion has arisen where we definitely have, yes, sir.

Q. Now, when and where? **A.** Well, at various times.

Q. Well, can you give the names of the towns involved?

A. Well, I happen to particular remember in the case in New Haven, the theatre there that is affiliated with Paramount tried to buy our pictures or offered to buy some against our account, which we have had for many years, which first was Poli and now is operated by Loew. I know of that particular situation because it was brought to my attention.

(1836)

Q. When was it? When did that occur? **A.** There was a particular conversation as to that within two or three years.

Abraham Montague—By Defendant—Cross

I can't tell you whether it was three years ago or two years ago, but it was quite recent.

Q. You mean after the consent decree in this case or before? A. Well, if it be two or three years it would be after the consent decree.

Q. Now, what was it that occurred in that instance? A. In that instance it seems that the theatre that is associated with Paramount was short of pictures, and we had some particular picture, and they wanted that picture pretty badly to fill out some particular play data. I can't just remember the name of the picture, but I do remember the incident. And they did not get it because we had had the contract and we could not do anything about it.

Q. That was the situation where your pictures were committed to Warner. — A. Committed to Loew's.

Q. —or committed to Loew's, and Paramount wanted to pick up a picture to fill in with that was committed to Loew's and you were not able to release it, is that right? A. Yes.

Q. Now, any others? A. Well, I would not be able to stretch my memory because most of that would come through district men; but I know from time to time it has been called to my attention that there had been requests for pictures (1837) from so-called affiliates, one as against the other.

Judge Bright: You mean after your contracts had been made.

The Witness: Either after the contract had been made or prior to the making of the contract. You see, most of these contacts in our organization are conducted by district men. They are trained particularly to handle those accounts. Some of them are handled by the home office. So this negotiation would go on with the district man, and he, in turn, if there was a problem that he did not want to act on,

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such as this, he then would refer it to us in the home office for final decision.

Q. Do you recall any other situations yourself? A. No, offhand I could not. If I had time to think I could, I am sure I could.

Q. Well, insofar as the negotiations for any regular first-run of your season's product is concerned, I take it there were none? A. No, I would not say there were none. I am trying to say I believe there were some.

Q. Where did that occur? A. I am trying to say if I had time, I believe I could get definite situations on this. I don't want to trust to my memory on this. I do remember some instances in the case of New Haven.

Q. That, as you remember, did not relate to the licensing (1838)

of the first-run season deal, did it? A. No; it was related to a picture.

Q. I say, other than these situations which relate to a single picture or a few pictures, don't you know as a matter of fact that there have not been any? A. No, I do not know that, Mr. Wright, and I am trying to think very hard, but I believe the story in New London would prove my case. I am not positive on the records, but I am almost positive there is where we did sell Paramount and we now sell Warner Bros. And I think that is on an entire year's product. I am almost positive, and I am sure I can dig up many more such cases if necessary.

Q. Well, will you see what you can do along that line when you bring this other data in? A. Yes, I will be glad to.

Q. Now, in those first-run situations generally, where Loew has a theatre, you sell Loew, is that right? A. No, that is not right, Mr. Wright.

Q. Where there is more than one affiliated house and there is a Loew theatre, can you point to any of those where you do

Abraham Montague—By Defendant—Cross

not sell Loew? A. Well, now, let me see. We sell Loew in Boston where there is an affiliate; we sell Loew half the product in Providence, and we have played some pictures in Providence and also in Boston with RKO.

Q. Those are pictures which Loew has released to RKO, (1839)

isn't that right? A. No, sir, they are pictures that we requested Loew release to us and for us to sell to whomever we may desire to sell to.

Q. Well, in any event, before they were made available to RKO, you had to get your release by Loew, isn't that right? A. Yes, sir. Sometimes Loew released pictures to us in Boston to sell to the independent, at our request.

Q. Now, are there any situations you can recall where Loew has a first-run— A. Well, have you a list there of the Loew situations? If you have that it would make it a little easier for me than to try to remember it.

Q. I don't think your charts show a breakdown as to which is which? A. If I had a list of the situations I could tell you immediately, sir.

Q. Here is your admission of facts. Now maybe that would help you (handing). A. I believe Loew has a first-run theatre in Cleveland. We sell to RKO, which is now in the pool with Warner Bros.

Q. You sell the RKO-Warner pool? A. Yes, sir.

Q. And you have sold them for the last what, ten years? A. Well, we sold RKO for many years, and then when the pool became effective we played with the pool. To the best of my knowledge Loew has an interest in a theatre in Denver, and we sell to the Fox affiliate.

(1840)

Q. You are referring there to the RKO Orpheum? A. Yes, sir. I believe that is the theatre.

Q. That is a theatre that is not operated by Loew; it is operated by RKO, isn't it? A. That is one of the defendants, sir. I thought you said any first-run—

Abraham Montague—By Defendant—Cross

Q. What I wanted to have you point out were the situations where Loew had a first-run theatre and where another defendant had a first-run theatre, and where you sold the other defendant rather than Loew— A. I just named the spot—

Q. —such as Cleveland? A. Denver.

Q. Well, I take it in Denver what you referred to as a Loew operation is one that is operated by RKO in which Loew has an interest, is that right? A. Oh, we sell to the Fox affiliate there. We do not sell to Loew or to RKO. Loew has a theatre in Houston, I believe, and we sell to the Interstate circuit, an affiliate of Paramount.

Q. Well, the situation, whatever it is, as it exists today, is correctly reported in the admission of facts there? As to 1943-1944, have there been any changes from 1943-44 to now in the distribution of your product first-run among the affiliated first-run accounts in the 92 cities? A. There might be, Mr. Wright. I do not want to trust to my memory.

Q. You don't know? A. No, I do not know.

Q. Well, if there were, that would be reflected in this exhibit that you have given us here, C-6? A. I would (1841)

assume so, sir. I am not completely familiar.

Q. Well, your C-6 gives your distribution as of 1944-45?

A. Yes, I would assume so, sir.

Q. And I take it this is the latest information you have?

A. Yes.

Q. Now in those first-run situations, I believe, as Mr. Raftery pointed out, your large city first-runs, you have a situation at the present time where you have what would be called a glut of pictures; that is, more being made available than is room for? A. I do not understand that question. Would you repeat it, Mr. Wright?

Abraham Montague—By Defendant—Cross

Q. I say, in the key metropolitan first-runs, the situation you have now is that there are more pictures available under contract for exhibition in those situations than there is playing time for, is that right? A. Metropolitan? What Metropolitan are you referring to?

Q. In large cities, cities over a hundred thousand. A. I don't know whether you were referring to metropolitan cities, or Metropolitan New York.

Q. No. A. There are more pictures than there are dates for first-run?

Q. Yes; generally is that situation true? A. I would think so.

Q. And in your subsequent runs the situation—

Mr. Davis: Occasionally we are able to hear counsel (1842)

sel, and occasionally the witness; but when they both speak at the same time we throw up our hands.

Judge Hand: Read the last several questions and answers.

(Record read.)

The Witness: More pictures available or more pictures under contract?

Q. Well, at the present time, pictures are what is known as backed up in those first-run situations, isn't that right?

Mr. Caskey: I object to the generality of the question, both as to the producer and the exhibitor. I think that any such testimony should be confined to specific cases. I am quite certain we can adduce testimony that even in Boston, where he talked about, there is no backing up on our product.

Judge Hand: Overruled.

A. Speaking of my product?

Abraham Montague—By Defendant—Cross

Q. Yes, as far as you are concerned. A. In some of the cities there is a backing up of our product, yes.

Q. And generally in the subsequent runs, shortage is the result of that, is that true? A. In some rare cases but not too many, because the subsequent runs can use pictures in many cases where the first run cannot use, so they are available without waiting for that first run.

(1843)

Q. Under your prevailing clearance system, though, insofar as those pictures are concerned, which are good enough for first-run exhibition, those simply have to wait until their turn in the first-runs before they can be made available for general release down through the subsequent runs; isn't that right? A. Correct, sir.

Q. Now I am going to call your attention to a specific situation in Salt Lake City, Utah. Your pictures there have played a number of years in the Paramount houses there? A. They have been sold to the Paramount affiliate for quite a few years, yes, sir.

Q. And there is an independent who has a couple of theatres there? A. There is an independent. I don't know just how many theatres he has.

Q. First-run? A. First-run.

Q. Now, in that situation it is the fact, is it not, although you have not had your pictures played off promptly in the Paramount houses, you have not made available to the independent any of those which have been backed up, have you? A. What made you think we had a back-up in Salt Lake City, sir? As I remember Salt Lake City, it has been playing our pictures very fast.

Q. You would say there was no time in the last year when you had pictures that might have been released for six months and not played there? A. I have no record of that, (1844)

sir. I had no difficulty in play-off as I remember Salt Lake City.

Abraham Montague—By Defendant—Cross

Q. Well, do you know? A. To the best of my knowledge I should say there is no difficulty in getting our pictures played in Salt Lake City.

Q. Now I will call your attention to the particular picture, A Song to Remember. Do you recall that one? A. I recall the picture, Song to Remember, yes, sir.

Q. Do you know at what time you sold that to Paramount for in Salt Lake City?

Mr. Seymour: Mr. Wright, I hesitate to object. You are constantly referring to a sale to Paramount. The testimony, universally, and without dispute, shows that those theatres are operated by separate companies, and I think I shall have to ask you to put your questions in accordance with the undisputed testimony rather than try to give it a twist.

Q. Do you know what the name of the affiliate is there?

A. No, I do not have it offhand. You say it is in the records there?

Q. Well, you did not have any trouble understanding what I was talking about, did you, when I said Paramount?

A. I assumed that you meant one of these affiliated companies.

Q. The affiliated company that is your first-run account (1845) in Salt Lake City.

Mr. Seymour: That is objected to, Mr. Wright.

Q. Now, can you tell me the terms on which you licensed that picture to the Paramount affiliate there? A. No, I could not unless I refer to the records, sir.

Q. You don't know what you got for it? A. No, I don't remember.

Q. Do you recall getting an offer for it from the independent there? A. Yes, I do remember getting an offer from the independent.

Abraham Montague—By Defendant—Cross

Q. Did you ever reply to his offer? A. I am quite sure I replied. I am positive I replied to that offer through my branch manager.

Q. Well, as far as you yourself are concerned, did you make any reply personally? A. I would have to refer to the records whether I wrote direct, but I do remember discussing the matter with the district man and the branch manager.

Q. Well, I am talking about with the independent? A. I did not talk with the independent. He did not talk with me, He wrote me, sir.

Q. And you know that you did not reply to his letter, isn't that right? A. I do not know that I did not, Mr. Wright. I would like to refresh my memory by looking into the files.

(1846)

Q. Well, have you ever offered him any pictures there? A. I am not sure whether we have or not.

Q. Well, do you know? Can you remember ever having offered him any? A. No, I do not know that we have.

Q. Now, in your dealings with the theatres that are affiliated with these defendants, you are still making franchises occasionally? A. Yes, sir.

Q. And in evidence here, I believe, is one that you made with Warner and one with the Evergreen circuit.

Mr. Frohlich: What is the number of that?

Q. I will show you this 265. That is a three-year deal, is it not, that you made in 1942, with the Evergreen Theatres Corporation? A. Yes, sir, we made a three-year deal.

Q. That is a Fox affiliate? A. That is, as far as I know, a Fox affiliate.

Q. And the date of that is November 23, 1942. And then I will show you this agreement dated May 18, 1944, which is marked as Government's Exhibit 266, and ask you if you recognize that as a three-year deal you made with Warner? A. Two-year deal with Warners.

Abraham Montague—By Defendant—Cross

Q. What are the seasons involved? A. It seems to involve the season of 1944-45, and 1945-46.

Q. Doesn't that also cover 1943-1944? A. Yes, correct. You are correct, Mr. Wright.

(1847)

Q. So it covers the three seasons, 1943-44, 1944-45, and 1945-46, is that right? A. Yes, sir.

Q. Now that agreement, master agreement you have in your hand there, does not have attached to it, does it, all of the deal sheets which would show the precise extent of the coverage, isn't that right? A. No, sir; there is no deal sheet attached.

Q. And offhand do you know how much of the circuit that covers? A. No, I do not know offhand.

Q. Now, I want to show you this deal that was made for the 1943-44 season with the Sparks circuit, which is in evidence as Exhibit 267. That is, in general, the kind of a deal you have been making with that circuit for the last seven or eight years? A. No, sir, it is not.

Q. How does it differ from the prior one? A. Well, prior to this contract we sold this circuit on a flat basis, and here in this contract we have certain pictures playing in certain towns on percentage.

Q. Other than the fact that you got some percentage pictures in here, though, I mean the terms in general were the same as before? A. No, the terms are not the same, sir.

Q. Well, let me call your attention to this particular provision: "The exhibitor has the right to use each of the hereon mentioned features 85 times. It is understood and agreed (1848)

that Exhibitor is to pay Columbia Pictures Corporation entire amount involved in each feature upon presentation and acceptance of the first play date on each feature. The exhibitor agrees to consume all runs on each feature listed hereon within a period of ten months from date of first-run.

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It is understood and agreed that these pictures are to be played in such theatres as they are now being served under current contracts."

Now that provision is a provision similar to one you had been incorporating in your Sparks deals for some time, is that right? A. Yes, sir; it might be, I am not sure.

Q. Now this contract simply lists under run and clearance provisions, forty-odd towns here with the statement, first and consecutive subsequent runs. Now that means, does it not, that the Sparks circuit could take your pictures and play them in each and every one of those towns on as many runs as they please as long as they stayed within that 85-time limitation, is that right? A. Yes; we know of the runs, of course, when we signed the contract.

Q. But as far as the contract is concerned, you simply gave him the privilege of showing the pictures, 85 runs in the forty-odd towns; and they could allocate and distribute the runs the way they pleased, isn't that right? A. Correct, sir. (1849)

Q. They had ten months to do that in, isn't that right? A. Ten months from the day they played the picture in the first situation, to complete all of their runs.

Q. So under this agreement that you made with the Sparks circuit, the pictures that were covered there—and I believe that covers your entire season's product, does it not?

A. Yes, sir.

Q. None of those pictures could be made available or offered to any opposition theatre until Sparks got through with such runs as they wanted, isn't that right? A. I believe we sell a run in four or five, possibly six of the Sparks towns; and I do not recall any difficulty in those towns of Sparks holding up the party unreasonably as against these opposition theatres.

Abraham Montague—By Defendant—Cross

Q. Well, with that contract in effect, you could not sell any run in any of those towns of the kind that you normally negotiate for where you give the fellow a definite run or availability in the town or location where he operates, isn't that a fact? A. Those theatres would buy a run in some cases after Sparks theatres, and I believe in one or two cases before Sparks played all of his theatres in that particular town.

Q. Well, under the contract all you could do would be to sell him a run after Sparks; and when they got the pictures would depend on what Sparks decided to do under the contract (1850)

tract, isn't that right, with his runs? A. If he acted in a reasonable way as regarding the contract, yes, but we force on dates on Mr. Sparks. If he tried to hold a picture back we would insist that he play it, or we may even assign it to him.

Q. I am not referring to what you would or might do; I am referring to what you do. There is no question, is there, but what you gave him the entire control of the runs of pictures in those towns for that ten-month period by that contract? A. He had ten months, a ten-months period in those towns to play the picture; ten months in all of the towns collectively, sir, not ten months in each town.

Q. I understand that. A. Yes, sir.

Mr. Proskauer: It was limited to 85 showings, is that right, Mr. Wright? I could not hear the witness.

Mr. Wright: Yes, 85 runs.

Mr. Proskauer: 85 exhibitions?

Q. Well, I take it the 85 showings means in substance 85 runs, is that right? A. Not necessarily. It depends on what you call a run.

Q. Well, what do you call a run? A. Well, as I remember this deal, I believe in one or two spots there is a run comes in before Sparks, one of the Sparks theatres. In other

Abraham Montague—By Defendant—Cross

words, Sparks might have three theatres—I am not positive (1851)

about this, but I have a slight recollection—

Q. Tell me what the 85 runs— A. May I explain this?

Q. Tell me first what the 85 showings means?

Judge Bright: Does it say 85 showings or 85 times?

Q. Will you read that provision, Mr. Montague? A. (Reading.) "The exhibitor has the right to use each of the hereon mentioned features 85 times."

Q. Now what does that mean in terms of number of runs that he could have in each or all of these towns? A. He could have one run in each one of the theatres in those towns, but he could not have more than 85. He may acquire theatres, but this is restricted to the 85 because we know of these 85 theatres.

Q. Well, there is no limitation as far as number of theatres is concerned, is there? That is, if he wants to distribute the 85 this way, let us say, five runs in one—showing five times in one town and none in another, or two runs in one town and three in the other, under that contract he has a perfect right to do so, hasn't he? A. That was not the intention of the contract.

Q. What? A. That is not the intention of the contract.

Q. Is that what it says or isn't it? A. That is not the way the sale was made and it is not the way he played the pictures. (1852)

Q. What? A. It is not the way the sale was made, and it is not the way he has ever played the pictures.

All I am trying to get at is what privilege the contract actually gives him. Now, is it not a fact that he can distribute the 45 exhibitions or the 45 times that he uses each of those pictures—I mean 85—among his theatres, all of his theatres in those towns, just as he sees fit? Isn't that the

Abraham Montague—By Defendant—Cross

privilege you gave him in the contract? A. That might be what the contract says, but it is not the way he operates, and therefore probably knowing the way he operates, we should have been more careful in specifying all the particulars. But we have been doing business with him; we know the way he operates; and probably the one who drew this contract was not very careful as to that point. We have had no trouble as to this matter at all.

(1853)

Q. When you do business with the ordinary independent exhibitor you sell him a specific run for a specific theatre under which he agrees and undertakes to play the picture at a particular time in a particular theatre at a particular admission price, isn't that correct? A. Not necessarily so, sir. We have "or" situations with the independent where he may have the right to play in this theatre, that theatre, or in the next one. Sometimes the "or" situation may run over four theatres. We have a lot of those, sir.

Q. I am talking about your normal situation where you are dealing generally with an independent, when you license him, you license him a particular run in a particular theatre at a particular admission price. That is normal, isn't that right? A. No, it is wrong. I am trying to say that the opposition to this man here in Miami does not do the way you are specifying. We sell the Wometco Theatres against Mr. Sparks, or what was known as the Sparks Circuit down there, and we do not sell him a specified theatre a specified picture at a specified price.

Q. I understand in selling Wometco and other circuits you may make the same kind of a deal that you made with Sparks here. I asked you as to your normal procedure in selling the ordinary independent account. As to that, sir, it is a fact, is it not, that you normally sell your independent

(1854)

a particular run for a particular theatre at a particular

Abraham Montague—By Defendant—Cross

admission price? A. Lots of the circuits, sir, are sold, and the independents, the ordinary way to sell them, we will say.

Q. Would you try and answer the question once more?

Mr. Frohlich: He has answered. I think he should be permitted to finish his answer.

Judge Hand: I think what the witness says is all right. You may probe him further about it, if you care to.

Mr. Wright: Will you read the question?

(Question read.)

A. Independents and so-called affiliated, too, we normally sell different than these, yes, sir.

Q. That Wometco you were talking about, that is one of those situations where you just give the product to Wometco for the first 140 days in Miami and then they move it around there as they like, and then it becomes available to the subsequent-run man, isn't that right? A. I just don't remember exactly, but it is done on a basis of difference, and, of course, we always claim we gave it to him, but he says we charged him too much for it.

Q. The same thing is done in the Paramount Circuit, which is the other major product there? Isn't that right?

A. Paramount Circuit where?

(1855)

Q. Sparks in Miami. A. We don't sell Sparks in Miami.

Q. Do you know what the system of clearance that is employed there is? Isn't it the same as Wometco, where Paramount has pictures for the first 140 days and then after that they become available as subsequent-run?

Mr. Seymour: I must ask you to stop this practice of eliding your questions on this record.

And, if your Honors please, I must object to a question where Mr. Wright asks about Paramount

Abraham Montague—By Defendant—Cross

doing something, because the evidence is absolutely uncontradicted that these transactions in connection with the theatre are not conducted by Paramount, and there isn't any dispute about that in the testimony.

Judge Hand: Let him specify.

Q. The Sparks circuit. A. I am not familiar with the clearance set up in Miami.

Q. Getting back to this question of clearance generally, you say that you do not know what the clearance is that other distributors license their pictures at in a particular community? A. Oh, no, of course I do not, sir. I would not attempt to try to remember all the communities of the United States.

Q. I say, in a particular community. Let us take Buffalo, New York. Is it your testimony that you do not know (1856)

in Buffalo what the clearances which govern the distribution of films in that city are with reference to other major distributors as well as your own company? A. I have it on the record, sir, but I do not know it at this moment.

Q. You mean Columbia keeps a record of it? A. Oh, yes, yes, sir.

Q. You don't know what it is, is that right? A. No, I don't know.

Q. Do you recall what happened there in the Bailey Theatre situation in Buffalo? Are you familiar with that? A. Is Bailey the independent that has some theatres in opposition to Loew?

Q. That is right, in opposition to the Buffalo theatres in which Loew and Paramount are interested. A. I have some recollection on that, yes, sir.

Q. And you recall that the Bailey brought an arbitration proceeding there? A. Yes, sir.

Abraham Montague—By Defendant—Cross

Q. Because they were being held behind one of the theatres in which Loew was interested? A. Yes, sir.

Q. And that after the arbitration proceeding an award was entered, which said that the Bailey could play one day behind the Kensington Theatre. That was it, wasn't it? A. I am not familiar with that.

Mr. Proskauer: I would like to know what you are saying that arbitration award is.

(1857)

A. (Continuing) I am not familiar with that.

Q. You don't know what happened there? Don't you recall that prior to the time of that award you were serving the Bailey Theatre there thirty days after first-run Buffalo, clear on Kensington? A. That could be true. I am certain.

Q. And then after that award came down you made the Bailey follow the Kensington on your pictures just as the other major distributors did, isn't that right? A. Do you know that to be so, Mr. Wright? You are telling me something. I don't know.

Q. I am asking you if it is a fact. A. I don't know, but I do remember one thing about the Bailey, Mr. Wright, I remember we did sell them Columbia pictures at different runs than they enjoyed for runs of the other companies, and this man in this Bailey Theatre, according to my memory, went on playing ours, we will say, first-run in that section and playing the others subsequent-run, and when we tried to get what we felt were reasonable terms for first-run in that situation, he refused to give it to us and said, "You are not entitled to any more than those I get from subsequent-run," and consequently we stopped selling him. Yes, sir, I remember that, and I don't remember selling it to anybody else, and I am not sure, but I think we are still out.

Abraham Montague—By Defendant—Cross

Q. Don't you recall that you declined to sell him except (1858)

on the run after the Kensington? A. I was willing to sell him the same run as I had—

Q. Did you have these negotiations with him yourself?

A. No, but this was called to my attention, an unusual situation, and that is why I have some recollection of it.

Q. What I want is exactly what, if anything, you said to the exhibitor who had the Bailey Theatre. Did you talk to him at all? A. Never met him on my life, Mr. Wright.

Q. You know, do you not, that you did refuse to sell him except on a run after the Kensington, isn't that right? A. Not to the best of my knowledge.

Q. You don't know that? A. I said, not to the best of my knowledge. My knowledge is that we offered him a run, the run that he enjoyed before, but we wanted some pictures on percentage and he said no.

Q. The transaction was handled by your branch manager? A. And district manager.

Q. You have no personal knowledge as to what the negotiations were between him and them? A. What has been reported to me.

Q. That is all you know? A. Yes.

Q. Is what your people reported to you? A. Yes, sir.

Q. When it comes to how Universal and United Artists sell pictures of course, do you know the extent to which Universal, for example, is still continuing to make franchises with defendants in this suit? A. No, I do not know to just (1859)

what extent, but we and our men watch them pretty carefully. They are direct competitors of ours, and we watch them most carefully.

Q. If anybody was to give testimony as to what their particular selling policy was with reference to these defendants, I suppose it would have to be some representative of

Abraham Montague—By Defendant—Cross

that company rather than you, isn't that right? A. You would be the better judge of that.

Mr. Raftery: I object to that as speculative and argumentative.

Judge Hand: Overruled.

Q. The same would be true with respect to United Artists, you don't know? A. Only from very careful observation of a competitor, sir.

Q. The terms on which they dealt with the other defendants, isn't that right? A. I don't know the terms, sir.

Q. On this list of pictures that you gave us here, first you have a list marked as C-4 in which you have labeled "First Class Pictures Produced by Independent Producers." Under the heading "Columbia," all those titles were released by Columbia, isn't that right? A. May I see it, sir? Yes, I believe they were all released by Columbia.

Q. And then under the heading "Universal," those are pictures that were released by Universal? A. I would assume so, sir.

(1860)

Q. And the other headings you have, "Walter Wanger", simply indicates the producer, with no indication as to whom he released to? A. Correct, sir.

Q. The same is true for Chaplin, Major Pictures Corporation, Howard Hughes and Edward Small? A. Yes.

Q. Pickford, Lasky, Selznick, Harold Lloyd, David L. Loew, Walt Disney, Samuel Goldwyn, Inc., Principal Production, Inc., isn't that right? A. Yes, sir.

Q. As to those you have listed under Monogram Pictures Corporation, those were released by Monogram, were they? A. Produced by Monogram, but some of them have probably been released in state-right exchanges. I am not sure of that.

Abraham Mohtague—By Defendant—Cross

Q. What period of time did you cover with this list? A. Well, it is quite a period of time. I can't give you—

Q. How long? A. Over years, sir.

Q. How many years? A. Maybe eight or nine years or more.

Q. Then Grand National Pictures, that was distributed by a company of that name which is no longer in existence?

A. I believe so.

Q. And the next, March of Time, Hal Roach, those you do not indicate who released them? A. No, just the producer. I don't know.

Q. Then those you list under Republic Pictures Corporation (1861)

tion, those were released by Republic? A. Or state-righters.

Q. You don't know which? A. I don't know which, because, I don't know, some of them might have been released before it took over the exchange.

Q. The remaining ones on the list, you don't know whom those were released by, isn't that right? A. No, sir, not here. The records would probably tell me.

Q. You have a note here, "See Schedules appearing pages 77 to 82 of the answer." What does that mean?

Mr. Frohlich: That answers your question, because it shows that this list covers a period of five years before this answer was drawn, and the answer was drawn in 1940.

Mr. Wright: All of these on Defendant's Exhibit C-4 that are included under the heading "See schedules appearing on pages 77 to 82 of the answer," those are already in your answer? Is this just a repetition of those?

Mr. Frohlich: I think it brings it down to date. Maybe it is repetitious; maybe it is some more, bringing it down to date.

Abraham Montague—By Defendant—Cross

Q. Mr. Frohlich says the period covered there is five years preceding the filing of the suit, is that so? A. It could be so.

Q. As to those produced since the filing of the suit, those appear on what you label here "Supplementing schedule" (1862)

appearing at pages 77 to 82 of the answer? A. Well, that is just what it says.

Q. And as to those your testimony is the same as to those under Columbia, being released by Columbia? A. Yes, sir.

Q. And for those other Republic, by Republic; those under Universal were released by Universal; and the rest you do not have the names— A. That is right.

Q. (Continuing) —of the parties who released them, is that right? A. That is right, sir.

Q. These pictures that you have introduced in evidence here as C-5 and you have labelled "Successful Foreign Pictures", do you mean pictures successful at the box office in this country? A. That is what I would call a successful picture, generally successful at the box office, of such theatres as played it.

Q. Of such theatres as played it? A. Yes.

Q. As a matter of fact, you have many pictures on there which had a very limited distribution in this country, haven't you? A. Yes, some of them had limited distribution. Some of them were successes in art theatres.

Q. The success in an art theatre is not a box office success, as you term it? A. Except in those theatres. Carnet de Bal, we happen to know, was a success in the art theatres, and was released for that purpose and not for what we call general distribution.

(1862a)

Q. Do you know what the American grosses of any of those pictures were? A. May I see them again? And I will try to refresh my memory. I do not see one called "The

Abraham Montague—By Defendant—Cross

Invaders." That is one I released myself when we grossed well over a million dollars with it.
(1863)

Q. Of those you have on the list, did you release any of them? A. Carnet de Bal, part of the release of that one. We brought it in here and then it was released through an independent.

Q. You mean you bought it and then turned it over to an independent? A. We were part of the production of the picture in France.

Mr. Proskauer: We cannot hear you.

The Witness: We were part of the production of the picture in France.

Judge Goddard: Does the Government contend the defendant limited the showing of pictures?

Mr. Wright: Oh, very definitely.

Judge Goddard: I understand the Government contends that they limited pictures to certain of the defendants, but did they generally limit the showing of a picture, do you contend?

Mr. Wright: Their marketing control has a definite exclusionary effect on any product. There is no question about that.

Judge Goddard: I should suppose it would be to their advantage to show the picture as much as they can.

Mr. Wright: I suppose that there are differences in the kinds of advantage to be gained by showing,
(1864)

let us say, some of these foreign pictures and some pictures which they produced themselves.

Judge Goddard: Then you do contend that they limited the showing of pictures generally?

Mr. Wright: Yes, they have a very tight control over what can be released in the way of box office returns of any picture in this American market.

Colloquy

Mr. Davis: I would like to ask if Mr. Wright contends that there is any picture, as to which he has any evidence, produced or to be produced, that shows that that picture was excluded from public exhibition in whole or in part. I ask the question definitely not as to his theories of what might occur, but what is the proof to support his theory on that subject.

Mr. Wright: There isn't any question but what we contend that there is an exclusionary effect as to every picture that is produced.

Mr. Davis: I am not asking what you contend. I am asking to what particular evidence can you point to support your contention.

Mr. Wright: I am just trying to get some evidence out of the witness here, if we may proceed. As I take it, his purpose in offering these pictures is to try and show that these foreign pictures received large box office returns in this country generally, even though they weren't produced or released by these de-

(1865)

fendants. That just doesn't happen to be the fact.

Mr. Frohlich: That was not my purpose in offering them, your Honors. My purpose was to show that there is a great deal of competition suffered by this particular defendant by reason not only of American pictures, made by independent producers, as well as pictures made by the affiliates, but even foreign pictures come into this country and are shown all over the United States and we have to compete with them. That was my only object in putting them.

Mr. Wright: He went so far as to label these "Successful foreign pictures."

Mr. Frohlich: Yes, they are.

Mr. Wright: I want to find out how much he knows about what success they enjoyed or did not enjoy.

Abraham Montague—By Defendant—Cross

Mr. Frohlich: Go ahead, I haven't any objection.

The Witness: What is the question, Mr. Wright?

Mr. Wright: Will you read the last question?

(Last question and answer read.)

Q. Is that the only picture on the list that you had anything to do with? A. On this list, yes, sir. To the best of my knowledge, reading this over, I cannot remember any other picture on this list.

Q. Just what was it you did in connection with the re-
(1866)

lease of that picture *Carnet de Bal*? A. It was a picture done in French and the producer happened to be here at the time and he wanted an opportunity to release it to the art theatres of the United States. He felt, handled individually, he could do better than if we tried to handle it with all our other product, so arrangements were made whereby Mr. Goetz handled the picture himself.

Q. And you had nothing to do with releasing it? A. Nothing to do with it except we were used in an advisory capacity and we helped him on the art and various other things.

Q. As to the other pictures on that list; what, if any, firsthand knowledge do you have about what kind of distribution any one of those pictures got? A. I have quite a lot of knowledge on that, sir; in my experience.

Q. Do you know what they grossed nationally? A. No. A successful picture is not what it may or may not gross. A successful picture is one that generally plays in the United States a large number of theatres. That would be what I call a successful picture. I can't tell you the gross of any of these pictures. I don't know the gross.

Q. Do you know how many theatres any one of those played in? A. Not directly, but I will tell you whether or not they got what we called general distribution, sir.

Abraham Montague—By Defendant—Cross

(1867)

Q. Just go down the list and give me the approximate number of theatres that each one played in, if you know.

A. I refuse to give it because I wouldn't know, I would be guessing, but I can tell you that Henry VIII was generally played in the United States; I can tell you Maedchen In Uniform was played considerably in the United States, and I would be very much surprised if it played less than six or seven thousand theatres, and probably played more; The Ghost Goes West, I happen to know a little about, but it was a successful picture, played a considerable number of theatres.

Q. Do you know who released it?

Mr. Frohlich: That was an Alex Korda.

Mr. Wright: I didn't ask him who produced it. I asked him whom it was released by.

A. I am not positive of this. We have records of it. Probably through United Artists.

Mr. Raftery: We will stipulate it was.

Mr. Proskauer: Mr. Raftery claims credit for it. He says United Artists did.

A. (Continuing) Mayerling, I know, had a lot of distribution in the United States; Rembrandt I don't believe got as much distribution as Mayerling had, but it was played around; Elephant Roy, I know, got distribution in the United States considerably; 39 Steps I know got a lot of distribution in the United States, successful picture.

(1868)

Q. When you say a lot of distribution, are you talking about five or six thousand? A. I would say six or seven, eight, nine thousand accounts in the United States—maybe six thousand, I don't know, but that would be what we call generally played.

Abraham Montague—By Defendant—Cross

Q. How many accounts do the best pictures that you may play? A. Best pictures?

Q. That you release. A. We sell a major part of our program between eleven and twelve thousand—between ten and eleven thousand, pardon me, and we have had some pictures play more than that, up to 15,000.

Q. So none of those pictures on your list ever compared even in the number of accounts that they played with your own best pictures that you released, isn't that right? A. Yes, but, of course, on the other hand my best pictures do not play as many accounts as somebody else's best pictures play, Mr. Wright.

Q. I understand that. A. That may be true of these too. We call these pictures successful foreign pictures. They got a successful run in the United States, most of them. Some of them not so successful.

Q. You mean a success for a foreign picture is one that does about half as much national business as one of your own (1869)

pictures, is that a fair definition? A. I wouldn't say that, sir. I would say it gets as much run as the public want to give it. If the public wanted to buy that picture, it could have 15,000 runs in the United States.

Q. In any event, how much gross is actually realized on any picture depends to a very large extent how it is exploited and where it is played in addition to the bare number of exhibitions that it has, isn't that right? A. Exploitation is very important, sir, yes, sir.

Q. That is, the extent to which it gets into your so-called key first-run situations has a very substantial bearing on that fact, is that right? A. Yes, sir, you are right.

Q. And was to what happened in that regard with respect to any one of these pictures is something which I suppose only the records of the particular distributor who distributed

Abraham Montague—By Defendant—Cross

it would disclose, isn't that right? A. I imagine that would be the only way to get the act—

Q. If you wanted to get the facts of what happened to the distribution of these pictures, that is where you would have to go, wouldn't you? A. Not where I would have to go. It is where you would have to go.

Q. If we wanted to get something more out of you than just generalities as to playing a lot of accounts or having dis-
(1870)
tributions, we would have to give you those records, wouldn't we? A. Yes, sir.

Mr. Wright: We have nothing more at this time. We would like to see those records that he is going to produce.

Mr. Frohlich: I will produce them in the morning, your Honors, and I will produce the witness too, so he may be interrogated on them.

By Mr. Seymour:

Q. Mr. Wright asked you about a situation in Salt Lake City. Can you tell us, do you recall why you continued to license your pictures to your customer there? A. Our customer in Salt Lake City is a very satisfactory account and we believe we get materially more out of our program as a whole selling it to him than we would to the opposition.

Q. Generally speaking, where you have a satisfactory customer, whether it is a so-called affiliated theatre or an independent exhibitor, do you continue to do business with that customer? A. Yes, sir.

Q. In New Haven, which I think Mr. Wright asked about, there are theatres affiliated with three different distributors, are there not? A. Yes, sir.

Q. And with which theatre do you do business, which one do you license your pictures to? A. We license our pictures to the theatre operated by Loew.

Abraham Montague—By Defendant—Cross

(1871)

Q. Do you go around annually to the Warner or the M. & P. theatre and see if you can license it to one of those theatres? A. Definitely not.

Q. Why not? A. Because we are very satisfied with our account there.

Q. Mr. Wright asked you something about Confidential Reports and I would like to ask you something about that since that was the first mention of the thing in this case. Your company contributes to that organization? A. Yes, sir.

Q. What does the organization do? A. It is a fact-finding organization dealing with the checking of percentage pictures.

Q. And it checks the records of exhibitors exhibiting the pictures of the distributors who contribute to its expenses? A. They send a man, in some cases it is a woman, to the theatre and that person stands, usually, in sight of where the tickets are being taken and checks the people that go in. Oftentime that checker will have a clock in his pocket or in his hand, as the case may be. Hourly he is supposed to go to the box office and ascertain the number of the ticket that has just been sold. Then he checks the day—the performance, and it may be matinee or it may be done hourly, or it may be matinee and evening. He checks and sees that the report that is sent to us by the theatre is in accordance with the check that he has made.

(1872)

Q. Do you get a report from the theatre on any pictures except your own? A. Absolutely not.

Q. Do you get a report from this checking organization on any pictures but yours. A. Definitely not. They only send to us such information that pertains to Columbia.

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Q. Is there any method by which you obtain information as to the transaction between the theatre and any of the other companies who contribute to the expense of this organization? A. There is no method.

Q. Prior to the use of this organization—by the way, when did you begin to use it? A. I believe about last April.

Q. Prior to the use of this organization did you use a different organization? A. We used a different organization, sir, Ross Checking Service.

Q. What were the conditions which caused you to use the new organization? A. Well, certain information through certain suits, where exhibitors had been in and their books exposed, on the examination of those books by counsel, it brought out that the books and the reports that we had received from the theatre did not jell, so as to speak, they were different. There were inaccuracies and that went into—when we looked into it, we found out there were many such inaccuracies.

(1873)

Q. That is, a number of exhibitors kept false books? A. I wouldn't say their books were false, I have no knowledge of that, but I do say in many cases the box office receipts, signed by them and sent to us, was not in accordance with their books. It was for a lesser amount than their books exposed.

Q. Did the other organization that you used use checkers? A. I beg your pardon?

Q. Did the other organization which you used use checkers, checking the number of persons coming into the box office?

A. The Ross Checking System?

Q. Yes. A. They were supposed to, sir.

Q. Did you find any cases where the checkers had been bribed? A. There were bribery cases, sir.

Q. Did you find any cases where exhibitors made a percentage deal with inspectors to pay them whatever amount

Abraham Montague—By Defendant—Cross

they could get away with in connection with their false returns? A. There had been false returns made of many kinds and types.

Q. Was it because of those circumstances that you joined in the formation of this new organization? A. Yes, sir.

Mr. Seymour: That is all.

Mr. Caskey: I have just one question.

(1874)

By Mr. Caskey:

Q. This Exhibit 265, Mr. Montague, contains the deal sheets, does it not? A. These are deal sheets, yes.

Q. And they are all the deal sheets? A. I would assume so, though I am not sure.

Mr. Caskey: That is all.

By Mr. Proskauer:

Q. Mr. Montague, I could not quite hear but I understood that you and Mr. Wright were having some colloquy about a theatre in Philadelphia that was in opposition to the Warner theatre there, and I thought I heard you say that you did not regard it entirely favorably. That referred to the Erlanger Theatre? A. Yes, sir.

Q. Just tell the Court what was in your mind as to that theatre. A. The Erlanger Theatre was a legitimate theatre that was taken over by a gentleman in Philadelphia, I think Goodman by name—

Mr. Frohlich: Goldman.

A. (Continuing)—Goldman, by name. Thank you for the correction. And he wanted pictures, solicited pictures for this theatre, first-run pictures. We considered it not the equal, and that our opportunities of income from that the-

Abraham Montague—By Defendant—Cross

atre would not be the equal of Warner Bros., such theatres as we had been playing in, operated by Warner Bros. in Philadelphia. We thought it was off the beaten path; we did (1875)

not think it had a clientele developed, and we feared if we treated seriously his request and entered into any negotiations that we would sacrifice a great sum of money.

Q. Would you say it is off the beaten path? It is way down on West Market Street, isn't it? A. Yes.

Q. And it is a block farther from the center of the theatrical region than even the Mastbaum? A. Yes, sir, which is also off the beaten path.

Q. And it is a fact that theatre had been dark, as we say in our amusement industry, for many, many years? A. Yes, sir.

Q. The Mastbaum had also been dark for many, many years? A. Yes.

Q. The Mastbaum was only reopened at the time that we had that wave of prosperity that came from the war in Philadelphia? A. Yes, sir.

Q. And the Erlanger Theatre had lain idle there down at the extreme end of Market Street, backing up on the railroad embankment for many, many years, had it not? A. Yes, sir.

Q. Closed, dark theatre? A. Closed theatre. Opened occasionally, as I remember it, for legitimate shows.

Q. You were asked a question as to whether you went out in various areas and got competitive bidding on your pictures. Do you remember that, some colloquy like that (1876)

between you and counsel? A. No, I do not.

Q. You were asked whether in given areas you went out and tried to get bids on pictures. A. We don't try to go out and get bids on pictures.

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Q. What would happen—I will put it this way to you: Is it feasible in your business to put pictures on the auction block and go out and say, "Who is going to make me the highest bid?" for pictures? A. No, sir.

Q. Tell me why not. A. We have a definite policy that at no time do we negotiate with two people. We find it absolutely necessary to have a continuity of releasing in a definite theatre, wherever we can possibly get it. That is not only for the benefit of Columbia but for the benefit of subsequent runs in that situation. They too are interested in where you play your picture first-run. And what we have practiced over a period of years, and our records prove beyond a question of a doubt—and it is what we like, is to continue to play with the same accounts that we have played with over a period of years, if those accounts have been satisfactory to us. If they are responsible, and their responsibility has stood up over a period of years, we think that is good enough to go along with.

(1877)

Your Honors, in many cases we play in houses where we know we could get more money from an opposition, but because we have been playing in that house for a number of years, and we have sturdy friendship, we feel it is best to continue there, but we don't feel we have lost by that—maybe we do get a little loss on a picture or two, but over all our program we feel that is much the better policy. And we change our accounts—so few accounts are changed, I would say, rather, in a period of years, it is hardly noticeable on our records, and our records will support that beyond a question of a doubt.

Redirect Examination by Mr. Frohlich:

Q. Will you refresh your recollection, Mr. Montague, as I interrogate you, from this list of the 92 cities? I have just one general question. You were asked by Mr. Wright to give

Abraham Montague—By Defendant—Redirect

instances where you sold away from Loew's to other affiliates. Will you be good enough to look at the following cities, Cleveland, Ohio,— A. Yes, sir.

Q. Did you sell away from Loew's there? A. In Cleveland, Ohio, we sell the Hippodrome and Allen, Palace—Hippodrome and Allen Theatres, to the Keith Ohio Corporation, operated by RKO, in a pool with Warner Bros.

Q. Look at Dayton, Ohio. A. Yes, sir.

Q. To whom do you sell there? A. The RKO Midwest Corporation.

(1878)

Q. Has Loew's a theatre there? A. Yes, sir.

Q. Look at Houston, Texas. Has Loew's a theatre there? A. Yes, sir.

Q. To whom do you sell? A. To Interstate Circuit, Inc. of Texas, operated by a Paramount affiliate.

Q. Please look at Memphis, Tennessee. Has Loew's a theatre there? A. Memphis, Loew has a theatre in Memphis, Malco Theatres, Inc., operated by Lightman, M. A. Lightman.

Q. Affiliated with Paramount? A. Affiliated with Paramount.

Q. Please look at New Orleans? A. Loew has a theatre there.

Q. To whom do you sell? A. Theatre operated by RKO.

Q. Please look at Wilmington, Delaware. Has Loew a theatre there? A. Loew has a theatre in Wilmington, yes, sir.

Q. To whom do you sell? A. Warner Bros.

Q. Are there other instances on that list where you sell from Loew's to independents? A. Many of them.

Q. Would that be true in Atlanta, Georgia? A. Yes, sir.

Q. In Baltimore, Maryland? A. Yes, sir.

Q. Canton, Ohio? A. Yes, sir.

Q. Hartford, Connecticut? A. Yes, sir.

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Q. New York City? A. Yes, sir.

(1879)

Q. Norfolk, Virginia? A. Yes, sir.

Q. Pittsburgh, Pennsylvania? A. Yes, sir.

Q. Richmond, Virginia? A. Yes, sir.

Q. Springfield, Mass.? A. Yes, sir.

Q. Toledo, Ohio? A. Yes, sir.

By Mr. Wright:

Q. When you say sold from Loew to independents in those towns you last mentioned there, did Loew ever play your pictures? A. Where?

Q. Any town, those last ones you mentioned. A. In any of these cities?

Q. Yes. A. To the best of my knowledge Loew never did play them. They may have played them in some, but to the best of my knowledge they never did.

Judge Hand: We will take a recess until tomorrow morning at 10.30.

(Adjourned to November 1, 1945, at 10:30

a.m.)

Abraham Montague—By Defendant—Redirect

(1880)

New York, November 1, 1945,

10:30 o'clock a.m.

Trial resumed.

ABRAHAM MONTAGUE, resumed the stand.

Redirect Examination Continued by Mr. Frohlich:

Q. Mr. Montague, you testified yesterday regarding a situation up in Buffalo. Do you want to correct that testimony? A. The testimony that I gave as to the Bailey Theatre in Buffalo was the situation that happened in the Rivoli Theatre in Buffalo. Probably the reason—

Q. Let me interrupt you. Did you refresh your recollection from your records last night? A. I did, sir.

Q. Now, please go on with your story. A. My memory probably failed me a bit as to the Bailey. Both situations were in arbitration, I believe, at the exact same time; both were asking for a change of clearance; both of them were in competition with the Sheas theatres. The Bailey was in opposition to the Kensington, operated by Shea; and the Rivoli in direct opposition to the Roosevelt operated by Shea. So in that case the testimony that I gave as to the Bailey was actually the situation of the Rivoli.

Q. As a matter of fact, you never sold the Kensington nor the Roosevelt? A. No, we have not sold the Kensington (1881)

for many, many years, and we still do not sell them; and we have not sold the Roosevelt for many, many years, and still do not sell them.

Q. Now, let me ask you whether there are instances, just a few, where you sold away from one affiliated theatre to another in some of the large cities included in that group

Abraham Montague—By Defendant—Redirect

of 92 cities? How about Chicago? A. Yes, we sold from one affiliated to another.

Q. And who was the affiliated account. A. We used to sell originally RKO; we now sell B & K.

Q. That is Balaban & Katz. That is a Paramount affiliate? A. Yes, sir.

Q. How about Houston, Texas?

Mr. Wright: May we have the dates on those, and when?

Q. Can you give us the approximate dates or the year or the season? A. In the case in Chicago I would say, without examining the records, somewhere around between 1933 and 1935.

Q. Houston, Texas? A. Houston, Texas—

Q. Did you formerly sell the Loew account in that city? A. Yes, sir.

Q. And then a time came when you switched to the Interstate Circuit? A. Correct.

Q. That was a Paramount affiliate? A. Yes, sir.
(1882)

Q. Syracuse—

Mr. Wright: Wait a minute. That was when? Will you have him give the dates on those?

Mr. Frohlich: Yes.

Q. Will you give us the date? A. Well, I should say approximately between 1933 and 1935. I do not remember the exact year, but I would say in that period, within that period.

Q. Now, do you recall about Syracuse, New York? A. Syracuse, New York, we sold RKO and then switched to Loew.

Q. Now, how about New York City?

Abraham Montague—By Defendant—Redirect

Mr. Wright: May we have the date each time?

Mr. Frohlich: Oh, yes. Will you give us the year of that in Syracuse?

The Witness: That occurred about the same period of time.

Q. How about New York City? A. In New York City we used to sell what is known as the Metropolitan group of theatres of RKO, and we ceased doing business with them in 1934, I believe, and started doing business with the Loew Circuit.

Q. Well, were there instances where you changed from an affiliated customer to an independent customer? A. Many such cases, sir.

(1883)

Q. Well, let me refresh your recollection. Do you recall Akron, Ohio? A. Yes, sir.

Q. Who is your present account there now? A. If you have the list, sir, I would like to have it.

Q. Suppose I give you the list and suppose you read off for the record just a few instances on the list. A. Our present customer is an account known as Chatkin & Feld.

Q. Independents? A. Independents. We formerly sold Paramount.

Mr. Wright: Can we have the date on that?

The Witness: I am afraid to trust my memory, sir, on these dates.

Mr. Wright: Can you give it approximately?

Mr. Frohlich: We can furnish the dates later on, Mr. Wright. We will look them up for you and furnish them.

A. (Continued) Duluth, Minnesota, we presently sell our pictures to S. J. Blacknow. We formerly sold to Paramount.

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In Erie, Pa., we sell to Weschler, and we formerly sold to Warners.

In Long Beach, California, we sell to an account known as Milton Arthur, and we formerly sold to Fox.

In Miami, Florida, we sell to Wometco, and we formerly sold to Paramount.

(1884)

In Oakland, California, we sell to Blumenfeld, an independent, and we formerly sold to Fox.

In Oklahoma City, we sell—the name is incorrect here as to the owner—here it is Dent. I do not think it is one of the parties. We sell this theatre in Oklahoma. We formerly sold first run, Oklahoma, to the Paramount.

In Pittsburgh we sell to Johnnie Harris. We formerly sold first-run to Warner.

Sacramento, California, we sell to an independent, Blumenfeld. We formerly sold to Fox.

In Seattle, we sell first-run to Von Herberg, an independent. We formerly sold to Fox.

In San Diego, we sell to an independent, the Metzger Estate, and we formerly sold to Fox.

In San Francisco, we sell first-run to Blumenfeld, an independent. We formerly sold to RKO.

Q. Have there been instances, Mr. Montague, where one affiliated exhibitor tried to get your product away from another affiliated exhibitor? A. Yes, sir.

Q. Did that happen in New Orleans? A. Yes, sir.

Q. Can you tell us—will this document refresh your recollection? Just tell us what happened in those three cities? A. Well, I was approached by Gaston Dureau—

Mr. Wright: Can we have the date of that?

Q. Can you give us the approximate date? A. Well, I (1885)

Abraham Montague—By Defendant—Recross

would say this was maybe some four or five years ago. I was approached by Gaston Durean for our product for the Saenger theatre, or for part of our product for the Saenger theatre, and of course we did not enter into any negotiations because I did not want to change my customer.

Q. Who was the Saenger theatre? What company controlled the Saenger theatre? A. We call it the E. D. Richards Company, an affiliate of Paramount.

Q. A Paramount affiliate? A. Yes; that is in New Orleans.

In New Haven we have been approached by Warners for part of the product and we have also been approached by Paramount. In neither case did we enter into negotiations because we were satisfied with our account.

Mr. Wright: Have you got the dates, again?

The Witness: I would say within the last two or three years, Mr. Wright.

A. (Continuing) In Boston we sell to Loew and we again have been approached several times by M & P, an affiliate of Paramount, for first-run product in that city. And we did not enter into negotiations because again we were satisfied with our account.

Q. Can you say generally that there has been competition between the Big Five for your product in the cities from time to time? A. Yes, sir.

(1886)

Mr. Frolich: Your witness.

Recross Examination by Mr. Wright:

Q. With respect to these approaches you say that have been made in these cities at this time, there were, however, no negotiations, no discussion of terms, is that right? A.

Abraham Montague—By Defendant—Recross

We would not enter into negotiations, Mr. Wright, unless we had some reason for wanting to change.

Q. See if you can answer the question: A. I am sorry.

Q. I asked you if there were—whether it was a fact that there were or there were not negotiations? A. Maybe my interpretation of negotiations and yours might be different.

Q. There was no discussion of terms, is that right? A. No, sir.

Q. In none of those instances? A. In none of those instances.

Q. Insofar as the dates of these situations that you recounted, where you say the product went from an affiliated house to an independent, are concerned, I suppose if they occurred after the 1935-36 season, the shift, if any, would be reflected in this tabulation that you introduced in evidence here as Exhibit C-6, is that right? A. I would assume so.

Q. This, I take it, shows your customers in all of those towns? A. I would assume so.

(1187.)

Q. For the 1936-37 season through 1944-45? A. I would assume so.

Q. And in those occasions where you did make such shift, none of that product was offered to the independent until after it had been rejected by the affiliated circuit, isn't that right? A. No, that is not quite right, Mr. Wright.

Q. What is the fact? A. Well, I don't like to generalize because there were different facts in many of the cases. If you will ask of any particular one, or all, I will try to remember the situation.

Q. In any event, you did not get together as to terms with the affiliated circuit, and it was not until after you failed to get together that you made any offer to the independent is that right? A. In some cases, and in some cases we did not make offer at all.

Q. Do you know which those were now? Do you have any recollection on it? A. Well, in the case of M & P in Boston,

Abraham Montague—By Defendant—Recross

we broke over one picture called *Lost Horizon*, and when the next season's product came out, I did not offer that product to M & P. I went out and established new accounts.

Q. That is, you broke in a number of M & P situations?

A. I broke in all the M & P situations.

Q. Do you remember when that was? A. I should say (1888)

about six or seven years ago.

Q. In that case the breaks, such as they were, would be reflected again in your Exhibit C-6, isn't that right? A. I assume so.

(Government's Exhibits 378 to 381 inclusive marked for identification.)

Q. I will show you these contracts between your company and the Bailey Theatre at Buffalo, New York, which have been marked for identification as 378 through 381 inclusive, and ask you if you recognize those as the contracts made with that theatre for the 1941-42, 1942-43, 1943-44, and 1944-45 seasons respectively? A. Yes, sir.

Q. I call your attention to the earliest contract here. I beg your pardon, I believe I gave you the wrong dates on those. These are 1942-43, through 1945-46 inclusive, that is right, isn't it? A. Well, schedule for the season 1942-43.

Q. Yes. That is the first one. A. That is the first one.

Q. And in that one the clearance provision on which you sold him, the only thing that it said there was "14 days clearance on Genesee theatre," is that right? A. Correct.

Q. That means he was given that season 14 days clearance over a particular theatre, that Genesee theatre, is that (1889)

right? A. Yes.

Q. In the succeeding seasons I notice the clearance reads, "Immediately after Shea's Kensington theatre, 14 days ahead

Abraham Montague—By Defendant—Recross

of the Genessee theatre," and that provision continued, did it not, in the succeeding three seasons? A. Yes, sir.

Q. As I understand your testimony, actually in none of those four seasons there had you actually been selling the Shea's Kensington, is that right? A. Correct.

Q. Do you know why that particular clearance was inserted in there? A. Yes, sir.

Q. Why was it? A. He originally, or, we will say, in 1942-43, had a clearance, and that clearance, we will say, was regulated only by the Genessee. In other words, the first-run contract, the Lafayette, I believe, carries a 30-day clearance, so he could run the pictures thirty days after, or he could run the pictures two months after. That clearance was set up; and we could have put a run in between it; in other words, we could have licensed another theatre in that town for a definite 30-day clearance, which might have been in competition with this one, and then we could have run the Bailey theatre after that theatre, and our obligation was only to keep the Bailey theatre ahead of the Genessee theatre. Now I assume that the exhibitor began to become conscious of this—

(1890)

Q. I am not asking you— A. I am trying to give you the whole story.

Q. I am asking you if you knew what the circumstances were as to why you put that provision in there? A. I probably put it in at his request, sir.

Q. Do you know? Did you have any conversation with him about it? A. No, my—no conversation with him. My conversation was all with either the district manager or the branch manager, sir. My information comes from those two sources.

Q. As a matter of fact, the reason you put it in was, was it not, that you wanted to be sure that if you decided or were able to sell the Kensington theatre, that he would

Abraham Montague—By Defendant—Recross

have to follow, isn't that right? A. He would have had to anyway, according to the contract, Mr. Wright. His clearance was only based on the Genessee theatre, not on the Kensington.

Q. According to the contract that is in evidence here, or that is identified as 378, he did not have to follow the Shea's Kensington theatre in playing your pictures; did he? A. Does it say so there? I can't find it.

Q. Look at it. A. It said "14-day clearance on the Genessee theatre."

Q. And under that contract pictures became available to (1891)

him thirty days after the run downtown, and not after any run at the Kensington? A. I would assume only if I wanted to give him thirty days after. I had to give him—

Q. That is what you were giving him, isn't that right?

A. Oh, that is what I did give him, yes, sir.

Q. Then in the succeeding seasons you say that you think you put in there "Immediately after Shea's Kensington theatre" at his request? A. After the decision of the arbitration, which I believe was set up by the Consent Decree.

Judge Bright: What does that mean?

The Witness: Maybe I did not make myself too clear.

Q. You certainly did not. A. I will try to, Mr. Wright. This Bailey theatre went to arbitration as to this clearance.

Judge Bright: Bailey was an independent?

The Witness: Yes, sir.

A. (Continuing) And according to the information I have, arbitration found for him and gave him a clearance immediately after the Kensington theatre. Now that established in my opinion a run for him which was quite definite.

Abraham Montague—By Defendant—Recross

Judge Bright: Who was operating the Kensington?

The Witness: The Kensington theatre is operated—we call it one of the Shea theatres, and I believe it is now operated by Loew's.

(1892)

Mr. Wright: It appears from the evidence in the record, if the Court please, that it is actually operated by Buffalo Theatres, Inc., one-third of the stock of which is owned by Loew's, and one-third of the stock is owned by Paramount, and one-third, I believe, was owned by Mr. Shea, and it was known as part of the Shea operations. That is why—

Judge Bright: Go on, Mr. Montague.

The Witness: When arbitration decided for him that he should have a run immediately after, naturally, we put it into our contract. That still gave us the opportunity of selling, if we could, the Kensington Theatre, and if we did, the Kensington Theatre could have run ahead of the Bailey Theatre, as found by the arbitrators. We could not succeed in making the sale in the Kensington, so our film is still being played, not held up in any instance, is still being played at the Bailey Theatre, and he is actually playing 30 days after the first-run, which is the Lafayette Theatre, in Buffalo.

Q. That is only because you still haven't sold the Kensington? A. Mr. Wright, if I could possibly sell the Kensington, I would, and in that case Bailey would run immediately after the Kensington.

Judge Bright: You mean by "immediately" without any clearance?

(1893)

The Witness: One day.

Abraham Montague—By Defendant—Recross

Judge Bright: One day?

The Witness: One day.

Judge Bright: After the termination of the engagement in the Kensington?

The Witness: Yes, sir.

Judge Bright: But he would still have to be 30 days behind the downtown theatre?

The Witness: Yes, sir, because that is in the downtown theatre contract.

Judge Bright: Would the Kensington also?

The Witness: Have to play 30 days, sir.

Mr. Wright: I did not hear the first question there.

(Record read.)

Q. That is, the Kensington would play 30 days after downtown; then he would play one day after the Kensington? A. It would be right; yes, sir.

Q. Not only in that case but in the ordinary case where you grant clearance to one theatre over another, you merely follow the pattern that is set by the clearances given by the other major distributors, isn't that right? A. By all distributors, sir, so-called major and those that we do not call major, such was Republic, Producers—and the other one skips my mind.

(1894)

Mr. Frohlich: Monogram?

A. (Continuing) By the way, they are growing into a major class, too, you know.

Q. When you grant it, you do not make any independent determination yourself as to whether it is reasonable or unreasonable, is that right? A. Well, we consider—if it is unreasonable, the exhibitor usually discusses it and it usually reflects in the price which we get for our film.

Abraham Montague—By Defendant—Recross

Q. Yes, but can you answer the question? A. May I hear that question?

(Question read.)

A. Correct, sir,

Judge Bright: You mean you take it as you find it?

The Witness: Yes, sir, we take the clearance as we find it.

Q. And in some cases you know it is unreasonable and you still go ahead and grant it, isn't that right? A. I wouldn't say that in some cases I know it is unreasonable and I still grant it. If the clearance interferes with my income, I believe it is unreasonable.

Q. You recall testifying in a pretrial deposition in this suit in April 4, 1940? A. I remember I did, yes, sir.

Q. And I will call your attention to a question and (1895)

answer that occurred then and see if you recognize it as correct. Do you remember you were asked, with respect to clearance, "But even if you thought it was unreasonable, in order to protect your revenue from a particular area, you might be compelled to sell him on those unreasonable terms anyway, isn't that right?" and you answer, I believe, was "We grant a lot of clearance in the United States to circuits, independent circuits, affiliated circuits and individual theatres, that we do not believe"—"that we don't believe is absolutely necessary as claimed, but we find that in most of those cases it is standardized and it is going on and we, Columbia, do not feel we are big enough or strong enough to change it and usually comes up against a situation as to whether or not we want to sell or not, but we haven't so much trouble. In fact, I am almost ready to say that we

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are having more trouble today in setting clearances as between one independent against another as we have had in the case of one independent against a circuit. We find today that as a man acquires more theatres, an individual or a part of a so-called affiliated defendant here, he feels he is entitled as God's gift to more clearance. It is something that seems to grow as a weed in the garden of distribution, and we don't like it because I know when I had one theatre I was not nearly as fussy when I had three, and I guess (1896)

that has gone down, down the line."

you recall having given that answer? A. Oh, yes.

Q. And that is a correct statement as of today also?

A. I would not say it has changed the least bit, sir.

Mr. Frohlich: That is all?

Mr. Wright: That is all.

Mr. Frohlich: Are there any questions?

(No response.)

Mr. Frohlich: You may step down. Thank you very much.

(Witness excused.)

Mr. Frohlich: I have no further witnesses, your Honors.

Mr. Wright: If the court please, I do not believe I offered these exhibits which were identified. I offer them, and I take it there is no objection.

Mr. Frohlich: No objection.

(Government's Exhibits 378 to 381 inclusive for identification received in evidence.)

(1897)

Mr. Caskey: I call Morton Thalhimier.

Morton G. Thalhimer—By Defendant—Direct

MORTON G. THALHIMER, called as a witness on behalf of defendant Twentieth Century-Fox, being duly sworn, testified as follows:

Direct Examination by Mr. Caskey;

Q. Mr. Thalhimer, where do you reside? A. In Richmond, Virginia.

Q. What is your occupation? A. I am in the theatre and real estate business.

Q. What is the name of your corporation? A. The Neighborhood Theatre, Inc.

Q. Mr. Thalhimer, do you own any stock or other securities in any of the defendants in this case? A. No, sir, I do not.

Q. Does any of the defendants in this case own any stock or other securities in your corporation? A. No.

Q. Or have any profit-sharing arrangements with you? A. No, sir.

Q. You are an independent exhibitor? A. Yes.

Q. What theatres do you operate in Richmond, Virginia? A. We operate three first-run theatres: Byrd, State and Capitol theatres; one action house that is partly first-run and partly second-run, the Grand Theatre; and six subsequent-run theatres. I can give you the names if you wish them. Do you want the names of them?

(1898)

Q. Yes. A. The Venus, Ponton, the Westhampton, Bellevue and Ginter.

Q. Are there other first-run theatres in Richmond? A. Yes, sir, there are.

Q. Will you name them? A. Loew's, Inc. have the largest first-run theatre, and Fabian-Wilmer & Vincent have two first-run theatres and one action first-run and second-run combined; and also several subsequent-run theatres.

Morton G. Thalhimer—By Defendant—Direct

Q. I was going to ask you that. In addition to your six subsequent-run theatres, are there other subsequent-run theatres in Richmond? A. Yes, there are.

Q. Operated by whom? A. By Wilmer & Vincent-Fabian, and a man by the name of Ben Pitts, and by a Mr. Somer and by a Mr. Arcaro, of the white theatres; and then there are a number of negro theatres that are separate and apart, but they are also run independently by the Lichtman Circuit of Washington, D. C.

Mr. Caskey: Will you please mark this for identification.

(Marked Defendant Twentieth Century-Fox's Exhibit F-15 for identification.)

Q. Mr. Thalhimer, have you prepared a map of the City of Richmond showing the location of all the theatres in that city? A. Yes. I placed on this map of Richmond the names and the ownership of the theatres in Richmond.

(1899)

Q. Now, in the downtown business area what theatres are located? A. Loew's, Wilmer & Vincent's Colonial; National and Park and the State and Grand theatres.

Q. Those are in the heart of the business section of Richmond? A. Yes, sir.

Q. Now, where is your Capitol Theatre? A. That is located about 30 blocks west in a residential area.

Q. And where is your Byrd Theatre? A. That is also in a West End residential neighborhood about 30 blocks west of the business area.

Q. Then your Westhampton Theatre is in the northwestern part of the city? A. Yes.

Q. And in the northern part you have the Ginter and Bellevue? A. And Brookland.

Q. And Brookland? A. Yes.

Q. And those are approximately how far from downtown Richmond? A. I would say two or three miles perhaps.

Morton G. Thalhimer—By Defendant—Direct

Q. And then over in south Richmond you have the Ponton and the Venus? A. Yes.

Q. And you have indicated by a legend the name of the operator of each of the theatres? A. Yes.

Mr. Caskey: I do not think it is necessary to offer it in evidence.

Q. Now, on first-run what product do you play? A. We (1900)

play Twentieth Century-Fox, RKO, Columbia and Universal.

Q. How long have you played product of Twentieth Century-Fox? A. Since we first started in business in about 1927, one year after we started in business.

Q. And when you started that was with what theatre? A. With the Capitol Theatre, as a first-run theatre, and the Venus Theatre in south Richmond, as a second-run theatre or sub-run theatre.

Q. Subsequently you acquired the State Theatre? A. Yes, sir.

Q. And that is downtown Richmond? A. Yes.

Q. And within a few hundred feet of the Wilmer & Vincent-Fabian theatres? A. It adjoins them. They are on either side.

Q. Subsequently you leased the Byrd Theatre? A. Yes.

Q. Now, in the neighborhood theatres what products do you play? A. We play all of the products.

Q. You play in your neighborhood theatres the product of Loew's? A. Yes.

Q. Which plays at the Loew's Theatre downtown? A. Yes.

Q. Do you play the United Artists product which plays at the Loew Theatre downtown? A. Yes.

Q. And do you play the Paramount and Warner product which plays at the Wilmer & Vincent theatres downtown? A. Yes.

Morton G. Thalhimer—By Defendant—Direct

(1901)

Q. In your first-run operation do you take clearance on your product over all the other theatres in Richmond? A. Yes.

Q. How long is that clearance? A. The clearance is 30 days on the two second-run theatres and 45 days on the balance of the sub-run theatres of the city.

Q. And does the Loew Theatre take clearance on the product that it exhibits over the theatres which you operate? A. The identical clearance.

Q. And do the Wilmer & Vincent theatres take the same clearance? A. Yes.

Q. With respect to the product they play? A. Yes, sir.

Q. What is your present admission price first-run in Richmond? A. 46 cents plus 9 cents tax. 55 cents gross for the first-run theatres.

Q. Who fixed that admission price? A. Well, we fixed it so far as our theatres are concerned.

Q. How did you determine that that was an appropriate price to charge the public? A. Well, trying to be brief about it, the original prices when we started in business was 50 cents as a first-run price, which had been established there for a number of years; and perhaps in 1933 they were reduced to 40 cents so the public would not have to pay 10 cent tax. That was at the time the Federal tax was only on admissions above 40 cents. And since the increase of the (1902)

cost of operation the admission price is now fixed at 46 cents plus tax, which seems to be the price that is agreeable to the public and satisfactory in the operation of the theatre.

Q. In your business judgment is that the price which is best calculated to produce the largest gross revenue in your first-run houses? A. I think so.

Q. What do you charge in the subsequent-run houses that you operate? A. 29 cents, generally speaking, plus 6

Morton G. Thalhimer—By Defendant—Direct

cents tax. 35 cents. In both these cases, Mr. Caskey, I have only quoted you the adult night prices.

Q. Adult evening admission price? A. Yes, sir.

Q. And I will ask you whether or not in the industry when you refer to admission price, it is customary to quote the adult evening admission price? A. Well, I think so. I think I could give it to you for the children and matinees if you want it.

Q. No, that is unnecessary. Now, who fixes that admission price for those subsequent-run theatres? A. We fixed the admission price.

Q. You have a theatre in Richmond operated by Wilmer & Vincent playing 45 days first-run, which charges a higher price, have you not? A. Yes, sir.

Q. What theatre is that? A. That is the Carillon. They charge 33 cents plus 7 cents tax, or a total of 40 cents as (1903)

against 35 cents in the other sub-run theatres.

Q. That theatre is out near your Byrd? A. Yes.

Q. Now, in your license contracts with Twentieth Century-Fox do you make an agreement as to the admission price which you will charge in your first-run houses? A. Yes, it is written in the contract as to the price that is to be charged.

Q. And is that also true in the subsequent-run? A. Yes, it is.

Q. Has Twentieth Century-Fox ever attempted to compel you to charge a higher or a lower admission price first-run? A. No.

Q. Has Twentieth Century-Fox ever attempted or compelled you to charge a higher or a lower price in your subsequent-run theatres? A. No, they have not.

Q. Have you determined those admission prices in the exercise of your own independent business judgment? A. Yes.

Morton G. Thalhimer—By Defendant—Direct

Q. Now will you tell the Court the reasons why you purchase clearance from Twentieth Century-Fox on its pictures?

Mr. Davis: Will you read that question, please?

Q. (Read.) Well, when we license pictures first-run they are shown in theatres which are very much more expensive theatres as to the land and building, generally speaking, than our sub-runs or our competitors' sub-runs. And this matter of clearance so far as Richmond was concerned was (1904)

in effect when we first went into business in Richmond. It was first written into our contract, so we were thoroughly aware of it, and it seemed perfectly normal and natural that it should remain that way. It protects our first-runs against our own sub-runs, and, of course, against our competitors' sub-runs.

Q. And did you build one or more subsequent-run theatres in Richmond knowing that their availability would be approximately 45 days after first-run? A. Yes, we did.

Q. Do you license some pictures on percentage? A. A good many.

Q. Do you license some on flat rental? A. Yes.

Q. Do you license some on some formula whereby the amount of the film rental varies or fluctuates with the amount of gross receipts? A. Yes.

Q. Explain to the Court, if you will, a typical arrangement of that type. A. Where it varies?

Q. Yes. A. Well, perhaps the most outstanding example is with Metro pictures, and what they call their sliding scale. For instance, if they would determine 40 per cent, the top business of a theatre on 40 per cent where the picture had been profitable for the theatre, 40 per cent film rental—we have a theatre, for example, to illustrate, in Petersburg, where \$4000 a week's business was supposed to be tremen-

Morton G. Thalhimer—By Defendant—Direct

dously good—well, the week is divided up into ten units—
(1905)

three units for Sunday, two for Saturday and one for each of the other five days. Assuming that a picture plays a week, the units are not very material; but in smaller cities they often play part of a week. But if that picture reached \$4000 on a Metro sliding scale, for example, our film rental would be 40 per cent, or \$1600, which would mean that we would have \$2400 left over as our part of the week's receipts. If, on the other hand, that picture in Petersburg was not as good as Metro thought it would be, and it only did, let us say, \$2400 rather than \$4000 for the week, that film rental would drop to 25 per cent under the sliding scale; so the film rental would only be \$600. And when we deduct \$600 from \$2400, we only have \$1800 left; so we are very much better off to pay them 40 per cent on a picture that does \$4000 than we would be to pay them 25 per cent on a picture that does in the neighborhood of \$2000 or \$2500. So that the film rental is based on the ability of the picture to produce in the theatre, and it is based on our past experience.

We have the same thing with other contracts, and I think probably with Fox and Columbia and maybe RKO in which the picture—there is a reversion in the contract. If the picture does so much business, it is 40 per cent; if it does a lesser figure, it is 35 per cent; if it does a lesser figure,
(1906)

it drops to 30 per cent. I think that is due to the fact that even among great pictures they will do more business in one section of the United States than they will in another. For example, a picture exhibited south of the Mason-Dixon Line that glorifies Mr. Lincoln, or the northern idea of the Civil war, is very unpopular in our part of the territory; and we very often do not even play the pictures because the public won't come to see them. But that same picture in Boston territory might be a 40 per cent picture, whereas in our

Morton J. Thalhimer—By Defendant—Direct

territory if we played it at all it would probably not earn over 20 per cent.

Q. Mr. Thalhimer, do you consider those methods of buying or licensing film to be fair? A. I think they are very fair.

Q. How many first-run theatres do you have in Richmond?

A. We have three first-run theatres, and the Grand Theatre, which is a first-run action house.

Q. Now, how do you play the pictures in those theatres?

A. Well, those pictures vary in the method of playing, depending on what we consider the importance of the picture. For example, recently Fox's picture State Fair played day and date uptown at the Byrd and downtown at the State for one week. Then it played the following week day and date with the State downtown, the same theatre it started (1907)

in, and the Capitol. And then, if I remember correctly, we kept it another week in the Capitol. So it really had a total of five weeks' run, although over a period of three weeks. Now, our pictures vary first-run. One picture may play the Byrd by itself, and another may play the State by itself; another may play the Byrd and State day and date; another might play the Capitol and State day and date; and a good many of them will carry over from the Byrd and State day and date to the Capitol.

Q. Are you able in your experience to book your pictures in a manner which enables you to operate your theatres on first-run which you believe will be most profitable to yourself? A. Yes.

Q. Now, you have talked about a carry-over. What is that? A. Well, a carry-over in our position is that if we play a picture at the Byrd and State, and the picture is doing a very good business, we would take it immediately at the end of its run in the Byrd and State into our smaller Capitol Theatre for an additional week.

Morton G. Thalheimer—By Defendant—Direct

Q. Now, this picture State Fair, as I understand it you ran it continuously for three weeks in three different theatres all told, making five weeks total exhibition, is that right? A. Well, yes, I think it is; but it was not continuous in all of those theatres for the period.

Q. That is right. But it had a first-run; it was playing (1908).

first-run in Richmond for three weeks consecutively? A. That is right. I think that is right, Mr. Caskey.

Q. Yes, I think you just so testified. Now, at the time that it commented to play in the Byrd and State, you did not know whether it would play a second week, did you?

A. Well, we thought it would because we look at our first-run pictures and study them; and while we do not always predict what the public wants, in this particular case we anticipated exactly what happened.

Q. But it is a fact that the subsequent-run exhibitors' in Richmond, including yourself, availability to play that picture was dependent upon how long you ran it first-run?

A. Yes, that is right.

Q. And they could not book the picture or get a play date until it had been determined how long it would play first-run in Richmond? A. That is right.

Q. Wasn't that injurious to them? A. No, I do not think so.

Q. Was it beneficial to them? A. Well, we find in our own theatres,—which are the only ones I can speak about—that where a picture has a long first-run, where it is continuously in the same house, or when it is a carry-over, that when that picture reaches the sub-run theatres it does very much better business than the pictures that simply play a week. Now, that would be true of the Loew pictures in our (1909).

competitor's theatre. Loew very seldom carries over a picture, but they might take a picture in this very large house

Morton G. Thalheimer—By Defendant—Direct

and play it as long as three weeks. Well, when it finally gets to our sub-run theatres; that picture does better business in our sub-run theatres than the picture that Loew plays only one week; which probably is due to the fact that any picture which justifies a three weeks' run in a big house like Loew's is the kind of picture, where our neighborhood theatres are located, that people want to see. In other words, the long run is indicative of a good picture.

Q. Do you consider that you are injured or your business detrimentally affected if Loew's plays a picture like Week-end at the Waldorf for three weeks at their theatre in Richmond? A. No, we don't feel we are injured in our sub-run theatres.

Q. Do they exploit the pictures that they play? A. Yes, they do. They advertise them in the newspapers, radios, and exploit them thoroughly; which, of course, benefits the pictures when they reach us.

Q. Now, referring to advertising: What types of advertising do you do in your first-run theatres? A. We advertise in the newspapers, on the radio, in street cars; we exploit the pictures by every legitimate means we know, in cooperation with the manufacturers or retailers. We do everything (1910)

we can to popularize the pictures, the stars and the directors of it.

Q. Do you know a phrase "cooperative advertising"? A. Yes, I do.

Q. Will you explain that to the Court? A. Cooperative advertising is where the owner of the picture allows us an extra amount of money which he contributes, the producer contributes, towards advertising the picture. It is an increase to our own regular advertising budget, and very often it is a sum that is equal at least to 50 per cent of our weekly budget; sometimes it is considerably more, depending on the importance of the picture.

Morton G. Thalheimer—By Defendant—Direct

Q. Mr. Thalheimer, when you play on percentage or under one of these formula arrangements, do you by contract give the distributor the right to check your picture? A. Yes.

Q. Do you object to checking? A. No; we like to be checked.

Q. Explain that to the Court. A. Well, in each theatre, of course, there is a cashier and a doorman and a manager—

Judge Hand: What is the use of harping on this? If they have a percentage arrangement, of course they would have some way of checking. It would be natural.

Mr. Caskey: I should think so; but the allegation of the plaintiff's brief is that it is used for some sinister purpose, as I recall it.

(1911)

Judge Hand: Well, if you think there is anything in this kind of reiteration, go on.

Mr. Caskey: Well, let me just ask this question—

Judge Hand: It seems to me perfectly inevitable.

Q. Has the right of the Twentieth Century-Fox to check your pictures or to audit your books ever been used against you to your business disadvantage? A. No, sir.

Mr. Wright: Let him say what was done. That is a conclusion that can be drawn.

Judge Hand: Overruled.

Q. Now, you operate some theatres in Petersburg? A. Yes.

Q. Where is Petersburg? A. Petersburg is about 20 miles south of Richmond.

Q. And what is its approximate population? A. About 30,000.

Morton G. Thalhimer—By Defendant—Direct

Q. Do you have all the first-run theatres in Petersburg?

A. We do now, yes.

Q. And do you play the product of all the companies?

A. Yes, sir.

Q. Do you play pictures in Petersburg on a clearance after Richmond? A. Clearance is immediately following Richmond.

Q. And that applies to the pictures which you play first-run in Richmond and to the pictures which other exhibitors (1912)

play first-run in Richmond? A. Yes, sir.

Q. Do you want to play in Petersburg earlier than immediately after Richmond? A. No.

Q. Why not? A. Because people in Petersburg generally read the Richmond newspapers, and Petersburg gets the advantage of the first-run advertising and exploitation of Richmond; so to a very large degree it benefits Petersburg to play the way they are now playing, in my opinion.

Q. Do you find that the extended runs or the carry-over runs in Richmond adversely affect your patronage in Petersburg? A. I do not think so.

Q. They benefit it, do they not? A. I would rather be inclined to that thought, yes.

Q. Now, you have some theatres in the town of South Boston, Virginia, do you not? A. Yes.

Q. How big is South Boston? A. Oh, about 4000 people.

Q. How many of those theatres are presently operated?

A. One. We had two theatres there. One is closed.

Q. Why don't you operate the other? A. We tried to, but it is very uneconomical.

I would like to correct one statement. South Boston's population is 5250. (1913)

Q. It was your experience that you could not successfully operate two theatres in South Boston? A. Yes, it was.

Morton G. Thalhimer—By Defendant—Direct

Q. Mr. Thalhimer, in the operation of your theatres have you been adversely affected by the fact that the distributors from whom you license motion pictures also own theatres?

A. No, sir, we have not been adversely affected in our company by that.

Q. Have you been adversely affected by the fact that one of your competitors in Richmond is a so-called affiliated theatre? A. No, we have not.

Q. To your knowledge, has that affiliated competitor attempted to buy away from you the product which you customarily use? A. No, I do not think they ever tried to buy our product; not that I know of.

Q. You have been playing Fox product for at least 18 years now? A. Yes.

Q. You are an old customer? A. I think so.

Q. Do you consider that it is appropriate that as each new block of pictures is produced and released by Fox, that they should first be offered to you? A. Yes, sir, I do.

Q. Why is that? A. Well, we have been their customer for a good many years continuously; we have endeavored over that period of time to promote their pictures, their stars, (1914)

their directors, to the very best of our ability; we have paid them, generally speaking, what they have asked us for the pictures, subject to negotiations if the pictures had not turned out mutually satisfactory; and we could not go on and operate a first-run situation like Richmond if we did not know that we would have a continuous flow of product.

Q. In your business judgment have the defendants around this table ganged up to injure you?

Mr. Wright: Now, if the Court please, that is entirely improper.

Judge Hand: What is the question?

Mr. Caskey: That is the colloquial question.

Morton G. Thalheimer—By Defendant—Cross

(Question read.)

Judge Hand: Objection sustained. You ought not to take too seriously the characterization of—well, it was Judge Goddard's, really, and I took it over from him—of the claims of the Government. You have to defend yourself against them, but you cannot do it by asking questions like that.

Mr. Proskauer: I guess the policy seems to be to take your Honors seriously.

By Mr. Caskey:

Q. Mr. Thalheimer, in your judgment in the operation of your business in Virginia, would you be in any way benefited by the divorcement of the theatres which Twentieth Century-Fox has an interest in from that company? A. No, we would not be benefitted.

Mr. Caskey: You may inquire.

Cross-Examination by Mr. Raftery:

Q. Just one question to follow up what Mr. Caskey was asking you: Would you like to enter into a bidding contest with Loew's for Fox's first-run product in Richmond? A. No, sir, we would not.

Q. If the picture were sold on the auction block in that manner, could you, as an independent exhibitor, survive, or any independent exhibitor?

Mr. Wright: Now, if the Court please,——

Judge Hand: Objection sustained.

Mr. Raftery: That is his complaint in the Schine case.

Morton G. Thalhimer—By Defendant—Cross

Cross Examination by Mr. Davis:

Q. Mr. Witness, pictures never are sold on the auction block, are they? A. No, sir, they are not.

Judge Hand: I think defense counsel are getting more frivolous than I am.

Mr. Proskauer: I never heard the suggestion that your Honor was frivolous.

Judge Hand: I have heard it.

Mr. Proskauer: Well, I do not want to go down
(1916)
the peninsula, but I want to follow Mr. Raftery's lead, which is a good lead to follow, and I want to make his question that was incompetent, competent.

By Mr. Proskauer:

Q. What would be the effect on business if an attempt was made to sell pictures by putting them out and having competitive bidding on each picture or on each two or three pictures?

Mr. Wright: If the Court please, there is not anything to indicate that he would possibly know what the effect would be.

Judge Hand: I do not see that it is competent.

Mr. Proskauer: Your Honor, our difficulty is that it seems to us an absurdity, and yet we have indications that that is the Government's claim, that there is something sinister in the fact that we do not go around with every picture and say, "Who will give us the biggest percentage on this picture?"

Mr. Wright: To the defendants the whole theory of competition is absurd. There is no question about that. They simply do not believe in that. There is no use arguing over that.

Morton G. Thalhimer—By Defendant—Cross

Judge Hand: I will allow him to answer this question, if he can make any answer to it. It does not do much good to answer such a question practically yes or no, unless he has got some rationaliza-

(1916a)

tion of it.

Mr. Proskauer: That is why I asked him a question that did not call for a yes or no, but called for a description of it.

Do you understand the question, Mr. Thalhimer?

The Witness: I would like to hear it again.

(1917)

Q. It has been suggested here that there is some reason why pictures should be offered generally around in competition and competitive bidding asked for from exhibitors like yourself. Will you tell the Court what in your judgment that would result in the market and whether it would be good or bad for you as an independent? A. We have three first-run theatres in the City of Richmond which we have to operate 52 weeks. We charge a uniform price for the 52 weeks of the year. When we get a picture like State Fair, which is, we will say, a very extra fine picture, the people will have to come. The next week it might be a very mediocre picture but the public pay the same 55 cents for 52 weeks in the year. We do not have a theatre as big as 2200 seats. Our largest theatre is 1350 seats. The net result of the sale of each picture on its merits would be that Loew's theatre with 2200 seats could and would buy all of the big pictures like State Fair, that type of picture, Dolly Sisters, and leave us to any picture—to run our theatre with lesser pictures both of the Fox product—product that we deal with, and the lesser pictures, the lesser product of the Metro product which would mean that the bigger the theatre the higher price perhaps they could pay and the smaller theatres

Morton G. Thalhimer—By Defendant—Cross.

would have to operate, I think, with very much inferior product, and it would hurt the business materially.
(1918)

Q. Then you find that in order to serve the great runs of large but still smaller than the largest theatres, you have to be in a position where you can make permanent arrangements with the source of supply? A. Yes, sir.

Q. That is really the essence of what you are saying? A. I think it is, yes.

Q. And if you were to reduce the situation to where every producer had to go out and say, "Who will pay me the biggest price for this particular picture?" it would work very much to the disadvantage of independent operators like you? A. Yes, I think so.

Mr. Caskey; Mr. Wright.

Cross Examination by Mr. Wright:

Q. Mr. Thalhimer, were you served with a subpoena in this case? A. No, sir, I was not.

Q. You just came up here voluntarily by arrangement with the defense counsel? A. Yes, I was asked by Mr. Smith if I would come up, and I told him I would.

Q. Mr. Smith, who is that? A. Mr. A. W. Smith of Twentieth Century-Fox.

Q. Can you give us a general idea of how many theatres you have altogether and where they are, what your position is in the business generally? A. Our company and its subsidiary companies operate 29 theatres in the State of Virginia, ten of them in Richmond, five of them in Petersburg; (1919)

the other towns are South Boston, Pulaski, Farmville and Arlington, Virginia, and Falls Church, Virginia.

Q. You have, do you, all of these theatres in those towns you have named other than Richmond? A. Generally, yes.

Morton G. Thalhimer—By Defendant—Cross

Not a hundred per cent, say. In Arlington we have some competition.

Q. There is another theatre there? When did that open up? A. Well, it is built there. Shirlington theatre.

Q. The what? A. Shirlington theatre.

Q. Has it opened? A. Well, it is about to open. It may be open. I am not sure.

Q. I mean, as of now, at least there are no competing theatres in any of your towns outside of Richmond, is that right? A. Well, we consider Arlington, Mr. Wright, a suburb of Washington, which it is, and we are in competition with the Washington theatres, which are first-run theatres.

Q. I understand that. A. And we are in competition with Alexandria, which has a certain clearance over our Arlington theatres. In the other spots we have no competition except the nearest large city.

Q. Yes. In this Richmond set-up you say you operate three first-runs there in which you play the features, and then you have another first-run where you play the Westerns, (1920)

is that right? A. Play the what?

Q. Did you say you had a first-run Western house? A. Yes, action house.

Q. Action is the name you employ? A. Yes.

Q. What are the other first-run theatres? You say Loew's and the others are pooled between Loew's and Fabian, are they not? A. They may be. I have no personal knowledge of the pool. I have heard of rumors that they were pooled.

Q. How many of those are there? A. There is Loew's and there is the Colonial and National, first-run theatres. And then they have a first-run action house, the Park theatre, which is similar in every way to our first-run action house, the Grand.

Morton G. Thalhimer—By Defendant—Cross

Mr. Davis: What do you mean by an action theatre?

The Witness: A theatre that generally plays Western pictures and melodramas and pictures with lots of action.

Q. So that the set-up you have there is that Loew's and Fabian then have three first-run houses and what you call an action house, and you have the same thing? A. Yes.

Q. And that major product is split there between your houses and the Loew and Fabian houses how? That is, what do they play? A. Loew's theatre has always played Loew's and United Artists, and the Wilmer and Vincent theatres have played Paramount and Warner Bros., and our theatres have played Fox and RKO, Columbia and Universal. (1921)

Q. And the have Loew, Paramount, Warner and United Artists then, is that right? A. Yes, our competition.

Q. They play the first-runs over there? A. Yes.

Q. They charge the same admission price as you do? A. Yes.

Q. In the first-run? A. Yes.

Q. Then there is one situation I think you mentioned there, where there was a subsequent run house that charge 40 cents. What theatre was that? A. Carillon.

Q. That is a Fabian or Wilmer and Vincent house? A. Yes, sir.

Q. That plays what, second-run of the pictures that play in the Loew and Fabian houses first-run? A. Plays sub-run.

Q. What is the difference? A. Well, there is very little difference, Mr. Wright, except that these two downtown action theatres, the Park or the Wilmer and Vincent and the Grand of our company, if they play any of the big pictures second-run, they can get them thirty days in back of the first-run, while all the other theatres in Richmond, which are sub-

Morton G. Thalhimer—By Defendant—Cross

runs, must wait 45 days. That is the reason I said the Carillon was a sub-run rather than a second-run.

Q. But it actually plays on second-run on pictures which (1922)

play downtown in the first-run in the Loew and Fabian houses? A. It plays sub-run on those pictures. In other words, those pictures that play the Loew and Wilmer and Vincent houses, may play the second run in their Park theatre before they reach the Carillon.

Q. That is, those action houses you referred to operate on a mixed policy? A. Yes..

Q. And they play Westerns first-run, then they may play a second-run on some of the pictures that come off the first-run houses? A. And if they want to play them, they play them before the Carillon or any sub-run theatre.

Q. This Carillon then plays what product, the same pictures that Loew and Fabian play first-run? A. Yes, sir.

Q. That theatre, is that in the same section of the town where any of your theatres operate? A. It is practically next door to our Byrd theatre, which is our largest first-run theatre.

Q. Your Byrd, that is in the same playing position on the product that you play first-run in your first-run houses? A. Our Byrd is a first-run theatre. It adjoins our Byrd theatre, which is a very important first-run theatre of ours.

Q. Your first-run theatres are divided between—that is, one of them is in the outlying section and two are downtown, is that it, or the other three? How are they distributed (1923)

geographically? A. Well, the only downtown first-run theatre we have is the State theatre, and then the Byrd theatre is uptown, and the Capitol theatre is also uptown; the Grand theatre, the action house, is also downtown.

Q. I was wondering whether there was any—then you don't have any subsequent run house there that is in direct

Morton G. Thalhimer—By Defendant—Cross

opposition to that 40-cent theatre there, is that right? A. No, sir, we do not.

Q. And is there any immediate opposition to any of your subsequent-run houses?

Mr. Davis: What do you mean by immediate opposition?

Mr. Wright: Subsequent-run houses playing in opposition in the same neighborhood.

A. I would say the correct answer to that would be no. They aren't too close to each other. That Carillon theatre, for example, is within about twelve or fourteen city blocks from our West Hampton theatre, but they are in different residential areas and we don't consider it too close.

Q. Other than that subsequent house that you call the Carillon, that Fabian operates, there are then no other subsequent-run houses in the city but yours? A. Oh, no; the Fabians also operate the Lee theatre, which is a very fine (1923-A)

sub-run theatre, and Ben Pitts operates two sub-run theatres.

Q. The Lee theatre is where with reference to your theatres? A. The Lee theatre is about 1200 west, and their Carillon theatre is about 2800 west, and our Capitol theatre is about 2400 west.

(1924).

Q. That Lee Theatre charges what price? A. 29 and 6; same as most of the other sub-runs charge, 35.

Q. 35-cent price. This other fellow you named, that has two, he is an independent? A. Yes.

Q. Where does he play? A. What does he play?

Q. Where? A. Well, his theatres are spotted on that map in the section of the city known as Church Hill, which is generally in the eastern part of the city. The theatres that you have been talking about are in the western part of the city.

Morton G. Thalhimer—By Defendant—Cross

Q. You have no first-run or subsequent-run in the eastern part of the city? You have no theatres in that section of the city? A. No, he is nearest to our South Richmond theatres, which would be the closest to Mr. Pitts' East End theatres.

Q. Does he follow your theatres, or how does he play with reference to yours? A. All of the pictures are made available 45 days after the completion of their first-run to all these sub-runs.

Q. That is, you have open booking? A. They could be played day and date in the East End and the Carillon and in South Richmond.

Q. After the 45-day period? A. That is right.

Q. Those sub-runs all charge the same admission price except the Carillon? A. No, sir, we have a sub-run in South (1925)

Richmond, the Ponton, which charges 25 and 5. Our Ponton and Venus theatres are almost 100 feet of each other, and we play the better pictures at the Venus and the slough pictures at the Ponton, so the Ponton charges are 30 cents against 35 cents for the Venus. There is another independent theatre in the eastern end of the city that I forgot to mention, the Star theatre. That also charges 30 cents.

Q. He plays what kind of pictures? A. He plays the same kind of pictures as all the sub-runs, what he wants of them.

Judge Bright: Is there any difference in clearance on the 30- and the 35-cent theatres?

The Witness: No, sir, none that I know of.

Q. The pictures are made available to all the independent houses 45 days after first-run? A. I think that is so.

Q. In that case, regardless of the differentials there that you mentioned? A. I think that is so, yes.

Mr. Wright: If the Court please, my attention has been called to the fact that we have in the file some

Morton G. Thalhimer—By Defendant—Cross

correspondence with this witness, and I would like to look at it before completing the cross-examination. We were not notified that he was to be a witness, and I would like to have a recess or defer cross-examination,

(1926)

so I may look at that material.

Judge Bright: How long has that system of clearances existed there in Richmond, the one that you were speaking about, the 30 and the 45 days?

The Witness: To my personal knowledge, ever since I have been in the business, which is 19 years.

Judge Bright: Has there been any change at all in that time?

The Witness: No, sir.

Judge Bright: In any of the clearances?

The Witness: No, sir.

Judge Bright: They were established before you started theatre operation?

The Witness: Yes, sir.

Judge Hand: Would you like to have a little recess to look over the file now?

Mr. Wright: I would appreciate that, yes, your Honor.

(Short recess.)

By Mr. Wright:

Q. This question whether you can compete successfully or not depends, does it not, on who your competitor is, to some extent, isn't that right? A. I think so, generally speaking.

Q. You do not worry about competition in buying films
(1927)
or anything else, when you are dealing with somebody else approximately your own size or smaller, or someone who has

Morton G. Thalhimer—By Defendant—Cross

no assured film supply, isn't that right? A. I don't know that I fully understand your question.

Mr. Wright: Will you read it?

(Question read.)

Mr. Wright: "who has an assured film supply."

A. Speaking only for myself, we are not worried about buying film and never been worried about buying films.

Q. Never been worried about competition in Richmond?

A. No, sir, we have never worried about our competition in Richmond.

Q. What is the name of the corporation you operate your neighborhood theatres there under? A. Neighborhood Theatres of Virginia, I believe. There are a number of subsidiary corporations that operate different theatres, Mr. Wright.

Q. Yes, but the one you use to operate the neighborhood houses in Richmond is Neighborhood Theatres, Inc., or do you have several subsidiaries that operate in Richmond?

A. Several subsidiaries that operate in Richmond.

Q. Neighborhood Theatres, Inc. operates which of the theatres? A. Neighborhood Theatres, Inc. don't operate any theatres. Neighborhood Theatres of Virginia operates several of the first-run theatres.

(1928)

Q. What is the name of the corporation that operates your subsequent-run theatres in Richmond?—corporation or corporations. A. The State Theatre is operated by a company called Victor Theatre, Inc.; Venus Theatre is operated by the Venus Theatre, Inc., and there are a number of corporations.

Q. How about the Bellevue? A. The Bellevue is operated by a company, either the Bellevue or the Rappahannock Theatres, Inc.

Morton G. Thalhimer—By Defendant—Cross

Q. That is located on Rappahannock Street, is it? A. Yes.

Q. Do you recall a former employee of yours who organized what was called the Willow Corporation? A. Yes. I do.

Q. What was his name? A. His name was Elmer Bryant, or E. H. Bryant.

Q. He had also been employed by Loew's there at one time, too? A. Yes, he had.

Q. And do you remember back in 1940 the Willow Corporation started to erect or had actually erected another theatre on Rappahannock Street there near your Bellevue? A. Yes, I do.

Q. What was the name of that theatre? A. The Ginter.

Q. Then in 1940 they were in the process of erecting another theatre on Grove Street, near your West Hampton (1929)

Theatre? A. Yes, sir.

Q. And then there were plans under foot, were there not, by the Willow Corporation to put some other subsequent-run theatres in against the ones you operated there, isn't that right? A. There were very strong rumors to that effect.

Q. And you knew, did you not, that the Willow Corporation was being backed by Loew's and Wilmer and Vincent, isn't that right? A. Yes, I knew that eventually.

Q. As a matter of fact, you had consultation with representatives of Loew's Inc. and Wilmer and Vincent about that threatened invasion of your suburban territory there; do you recall that? A. Yes, I had several talks with their representative.

Q. And the upshot of those talks was that you paid them both a substantial sum of money, isn't that right?

Mr. Davis: What was that?

(Question read.)

Stephen W. McGrath—By Defendant—Direct

A. The upshot of those talks was that we bought the assets of the Willow Corporation, if my memory serves me correctly, not for a substantial sum of money, as I recollect, but for the amount of money that they had invested in it, which was, from recollection, reasonably close to something under \$14,000.

Q. What you did was that you paid Loew's \$6,794.43 and \$6,794.44 to Wilmer and Vincent, isn't that right? The (1930) figures sound right to you? A. That is approximately \$14,000, yes.

Q. And after you made those payments then the theatre construction ceased and that theatre was half completed, isn't that right? A. That is right.

Q. And then you have not been troubled with any competition from Loew's or Wilmer and Vincent in Richmond since that time, have you? A. We got as much competition as we have always had. They have always been our competitors.

Q. At least they have not made any further efforts to move into your neighborhood area? A. That is correct, sir.

Mr. Wright: I think that it all.

(Witness excused.)

Mr. Raftery: Stephen McGrath, called on behalf of United Artists Corporation.

STEPHEN W. MCGRATH, called as a witness on behalf of defendant United Artists, being first duly sworn, testified as follows:

Direct Examination by Mr. Raftery:

Q. Mr. McGrath, where do you reside? A. St. Albans, New York.

Stephen W. McGrath—By Defendant—Direct

Q. How long have you been with United Artists Corporation? (1931)

A. 13 years.

Q. Judge Hand made a suggestion, during Mr. Caskey's examination of one of the witnesses, that each of the defendants prepare a chart similar to a chart that Mr. Caskey introduced in evidence, where we would take what has been classified as the guinea pig picture and show the town, the state, the theatre, whether it is affiliated or independent, the film rental received and the play dates in the 92 situations that the Government has been talking about. By the way, Mr. McGrath, in the 92 situations furnished United Artists by the Government, there were actually 73? A. That is correct.

Q. So wherever we talk about 92, we mean 73? A. Correct.

Q. Did you at my request prepare such a chart? A. I did.

Q. And you are in charge of these records? A. I am.

Q. And this chart was prepared under your direction?

A. Right.

Q. I show you the chart and ask you if that is it?

Judge Bright: Will you tell us what Mr. McGrath's connection with United Artists is?

The Witness: Assistant contract manager.

Judge Bright: To contract what?

Mr. Raftery: All exhibition contracts.

(1932)

A. I prepared this list.

Q. That is the chart you prepared? A. Correct.

Mr. Raftery: I offer that in evidence.

Mr. Wright: Mr. McGrath, the figures here, are any of them different than those you supplied in response to the interrogatories—

The Witness: No, sir.

Mr. Wright: (Continuing) —that the Government served?

Paul N. Lazarus—By Defendant—Direct

The Witness: The schedules were prepared from the same records.

Mr. Wright: We have no objection.

Judge Bright: What is the name of the guinea pig?

The Witness: Stage Door Canteen.

(Marked Defendant's Exhibit UA-1.)

Mr. Raftery: I have a copy for the Court: I call your Honors' attention particularly to the film rentals.

That is all, Mr. McGrath.

(Witness excused.)

PAUL N. LAZARUS, called as a witness on behalf of defendant United Artists, being first duly sworn, testified as follows:

Direct Examination by Mr. Raftery:

Mr. Raftery: In connection with the last exhibit of the 73 situations, we played six independent and (1933) the balance were all played in affiliated theatres.

Q. Mr. Lazarus, where do you reside? A. I reside in Mahopac in New York.

Q. Outside of a few months in the year 1924, have you been with United Artists Corporation since it was formed in 1919? A. I have been with the company continuously except for a few months in 1924 and a part of 1925.

Q. You have held many positions with the company? A. I have, sir.

Q. And for the last dozen years you have been manager of the contract department? A. That is correct.

Paul N. Lazarus—By Defendant—Direct

Q. And as such, every exhibition contract taken for the exhibition of United Artists pictures passes over your desk?

A. Yes, or through my department.

Q. You also are the contact man between the sales department and the producers' representatives, are you not? A. That is correct.

Q. United Artists is engaged solely in the business of distributing motion pictures, is that right? A. Yes, sir.

Q. It produces no pictures? A. Produces no pictures.

Q. Merely to refresh your recollection I will ask you to refer to this and tell his Honors the names of the producers with whom we presently hold contracts or are distributing pictures for. A. David O. Selznick, Mary Pickford, Charles Chaplin, Hunt Stromberg, William Cagney, Bing Crosby, (1934)

Edward Small, Sol Lesser, Lester Cowan, Jack Skirball, Benedict Bogeaus, Seymour Benenzal, Jules Levey, David Loew, Arnold Pressburger, Charles R. Rogers, Andrew Stone, Constance Bennett, Vanguard Films, Inc., Selznick International Pictures, Howard Hughes, Preston Sturges. Angelus Pictures, a corporation known as G.C.F., The J. Arthur Rank Pictures, California Pictures Corporation, Golden Pictures—

Q. That is Golden, isn't it, not Goldwyn? A. Golden, G-o-l-d-e-n. Golden Pictures, and Morey & Sutherland.

Q. Outside of Morey & Sutherland, all of those producers produce feature pictures? A. Feature pictures, yes, sir. (1935)

Q. During the period 1935-36 we distributed pictures for Samuel Goldwyn, did we not? A. Yes, sir.

Q. For Walt Disney? A. Yes, sir.

Q. And are they still producing pictures? A. They are still producing pictures but not releasing through United Artists.

Paul N. Lazarus—By Defendant—Direct

Through whom are they releasing? A. I believe both of them are releasing through RKO.

Q. The pictures that we are handling at the present time, can you tell us whom some of the directors are that direct the pictures that we are handling? A. I am not quite certain whether all of these are in current release, but they are pictures that we have handled or that we are going to handle immediately.

Q. When you say "have handled" you mean during the past eighteen months and during the next eighteen months?

A. That is correct.

Alfred Hitchcock, William Wellman, King Vidor, Sam Wood, Richard Wallace, Rowland V. Lee, Jean Renoir, Archie Mayo, Frank Tuttle, Allan Dwan, Edward Marin, Frank Lloyd, Arthur Lubin, Gregory Ratoff, Gabriel Pascal, David Lean, Douglas Sirk, Albert Lewin, Harold Schuster, Preston Sturges, Laurence Olivier.

Q. Can you tell us the names of the stars that have appeared in these current and immediately future pictures? (1936)

A. Ingrid Bergman, Gregory Peck, Joseph Cotten, Jennifer Jones, Shirley Temple, Jane Russell, James Cagney, Linda Darnell, Sylvia Sydney, Barbara Britton, Marie McDonald, Greg McClure, Dennis O'Keefe, Burgess Meredith, Claudette Colbert, Fred Allen, Don Ameche, Charles Laughton, Paulette Goddard, Randolph Scott, George Raft, Victor McLaglen, Betty Field, Zachary Scott, J. Carol Naish, Marx Bros., George Sanders, Jane Powell, Constance Moore, Ralph Bellamy, Constance Bennett, Gracie Fields, Laurence Olivier, Vivien Leigh, Claude Rains, Rex Harrison, Constance Cummings, Harold Lloyd, Hurd Hatfield, Francis Lederer, Akim Tamiroff, Signe Hasso, Gene Lockhart, Ruth Hussey, Rhonda Fleming.

Q. To complete the record, will you furnish us with the titles of the pictures that we are handling and will handle in the next immediate few months?

Paul N. Lazarus—By Defendant—Direct

Q. Picture called Spellbound.

Q. That is opening today? A. Opens today. Story of G. I. Joe. Duel in the Sun. Whistle Stop. Diary of a Chambermaid. Young Widow. Blood on the Sun. Angel on My Shoulder. The Southerner. Getting Gertie's Garter. Abilene Town. Scandal in Paris. The Sin of Harold Diddlebock. Tom Breneman's Breakfast in Hollywood. A Night in Casablanca. Blithe Spirit. Henry V. Caesar & Cleopatra. The Outlaw. Captain (1937)

Kidd, Paris-Underground. There Goes Lana Henry. Bedside Manner. Guest Wife.

Q. All these pictures are known in the trade as independent productions? A. Yes, sir.

Judge Bright: What period did that cover, those lists you have just read off?

Mr. Raftery: It will cover about twelve months back and about twelve months forward.

The Witness: That is correct, pictures in release and to be released very shortly.

Q. We handle between 20 and 26 pictures a year, isn't that about right? A. When we have a good year, yes.

Q. And we have handled as low as four? A. That is correct.

Q. In this group you have mentioned, I notice a number of British pictures? A. Yes, sir.

Q. As a matter of fact, United Artists have handled most of the important British pictures with two exceptions? A. We have handled British pictures for a considerable number of years and there was a time when—he is today Sir—Alexander Korda was one of the owners of United Artists Corporation.

Q. On that list that Mr. Frohlich had yesterday, he had a picture called "In Which We Serve"? A. Yes, sir.

Paul N. Lazarus—By Defendant—Direct

Q. And Mr. Montague was unable to tell Mr. Wright the gross domestic of that picture? A. I believe the domestic (1938)

and Canadian gross was about \$1,600,000; I believe that is close to it.

Q. We have handled a number of other important British pictures and are handling them now? A. That is correct.

Q. I believe Blithe Spirit? A. Blithe Spirit is an English picture. Henry V. is English made. Caesar & Cleopatra are English made.

Q. Those are handled for the— A. J. Arthur Rank Company.

Q. The J. Arthur Rank Company that you mentioned on your last part of your list of producers? A. Yes, sir.

Q. Now, Mr. Lazarus, will you tell the Court the manner and method of handling the solicitation of an exhibition license application, and what happens to it once the salesman is fortunate enough to get an exhibitor's signature on one? A. When a salesman negotiates a contract or an application, rather, for the public exhibition of one of our pictures, that contract comes through to the home office. If it bears the approval of the local branch manager or the division manager—district manager—it then comes to New York and we go over that contract in the home office. If the contract is a very important deal I will discuss it with one of the divisional sales managers, and if there is an agreement by the home office sales staff that the contract is a good acceptable contract, we then submit it to the producer's (1939)

representative in New York. Under our method of distribution, United Artists merely sells—negotiates the deals, but the contracts are finally subject to approval by the representative of the individual producer. He either approves the contract as we have submitted it, or he rejects the contract. If we feel that his rejection is open to question, we

Paul N. Lazarus—By Defendant—Direct

will discuss the contract with him, but in the last analysis his decision is final. If the contract is rejected, it is returned to the branch and there is no deal.

Q. Mr. Lazarus, are you familiar with the provisions in the various distribution agreements that we have about the right of each producer to approve or reject his own contract? A. That is in our exhibition contract.

Q. But I say you are also familiar with the provisions in the distribution contract? A. In the distribution contract, yes, sir.

Mr. Raftery: With Mr. Wright's indulgence, I intend to put this contract in through the next witness, if I may be permitted to show it to the witness, so we can read into the record just the important parts, and perhaps not to have to put the whole thing in.

Q. I have here, Mr. Lazarus, a contract dated April 10, 1944, with Bing Crosby Productions, Inc., for the marketing of a picture called The Great John L, and I call your attention to the first two paragraphs under "United's obligations," and I will ask you to read those two paragraphs. They are very short. A. Under "United's Obligations," "United agrees to devote its best efforts to the proper marketing and disposition of the motion pictures delivered hereunder in all the territories licensed hereunder wherein it customarily markets motion pictures, and to make such marketing as complete and efficient as practicable, so that the gross returns from the marketing of the product hereunder shall be as large as possible and at the same time consistent with the sound business policy of United."

- The second paragraph: "United will use its best efforts to procure prices, license fees and rentals in a fair and open market reasonably satisfactory to the producer."

Paul N. Lazarus—By Defendant—Direct

Q. I call your attention to the provision on page 12 regarding exhibition contracts, and I ask you to read it into the record. A. "Exhibition Contracts: The exhibition contracts for each of such motion pictures delivered hereunder shall be made separate and apart from the exhibition contract of any other motion picture marketed by United, with the exception that in territories other than the United States where it is customary to include more than one motion picture (1941).

ture on a contract, the producer authorizes United to market its product in accordance with that custom. In no event, however, shall any motion picture of the producer be used to enforce the licensing, leasing or other disposition of any other motion picture marketed by United, and in such territory where it is the custom to include on one contract more than one motion picture United shall set out the respective license fees for each motion picture after the name of such motion picture.

"United agrees upon the written direction of producer that United shall market wherever permissible the motion pictures designated by the producer or its agent as a unit, and in such case such unit shall be licensed separate and apart from any other motion picture marketed by United, with the exception that in those countries where it is the custom to market all of the motion pictures on one contract, United shall adhere to the prevailing custom."

Q. In the United States, on a few occasions, master agreements have been made with circuits both affiliated and unaffiliated, where in the original deal more than one picture has been included in the master contract? A. I believe, though, that those were all of the same producer. In other words, a deal, if my recollection is correct, I think that a deal (1942)

—a master agreement that covered two or three or four pictures, those would be the pictures of the same producer, as, for example, Edward Small, where we distribute four or five

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pictures made by Mr. Small in one season. I am not positive, I would have to search the record, but I don't think—I think we have an individual master agreement for each producer.

Q. Let us assume you do not, would you have individual deal sheets? A. We would have to have individual deal sheets and individual approval from any two producers who might have been on the same agreement.

Q. And you would submit to the producer's representative the deal sheets? A. For his—

Q. Which had his picture on? A. His picture only.

Q. For his approval or rejection? A. That is correct. (1943)

Q. Now I call your attention to the next provision—that is the "Producer's Right of Approval of Exhibition Contracts," and I ask you to read the provision. A. "The Producer shall have the right to designate a representative for the territories hereinafter specified. The Producer shall bear all the expenses of such representative. Such representative must have an office in the central location of such territory, and if so United shall submit to such representative for his approval or rejection all proposed written contracts with exhibitors for that territory. The territories and their central location are as follows:

Territory	Central Location
United States and Canada	New York
British Isles	London
Australasia	Sydney

"Producer agrees that submission shall not be necessary if made impractical by conditions beyond the control of United, such as conditions arising out of war.

"If the Producer has designated such a representative for any such territory United shall submit for his approval or rejection each proposed written contract for the distrib-

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(1944)

uting, exhibiting or marketing of such Producer's motion pictures or any of them in the territory in which such representative is acting. No such contract shall be accepted by United if within three (3) succeeding business days following the date on which said proposed written contract has been received by the Producer or its representative the Producer or its representative shall return such proposed contract to United with its rejection noted thereon or appended thereto.

"Should the Producer or its representative reject any such proposed contract the Producer or its representative shall have fourteen (14) days from the date of rejection in which to obtain a more favorable contract. Should the Producer or its representative fail so to do the original contract shall ipso facto be deemed approved unless the Producer or its representative shall have designated its original rejection as final. No proposed contract on which the rejection has been designated as final shall be entered into by United.

"Should the Producer or its representative at any time agree in advance with United upon the rental terms or license fees for the distribution, exhibition or marketing of any motion picture in any specified theatre or situation,

(1945)

United shall not be obligated to submit the contract containing the terms so agreed upon to the Producer or its representative for approval.

"The Producer agrees that United need not in any event submit contracts with exhibitors in licensed agency territories."

Q. Now, has this practice of producer representation been in the company since 1919? A. There has never been any deviation from that since the day the company was organized.

Q. Outside of the one picture that the company handled for William S. Hart, hasn't every picture had a producer's representative approve or reject every contract? A. Yes, sir.

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Q. And that was in 1925? A. Hart?

Q. Yes. A. Yes.

Q. Now, at the time of the commencement of the company, you were distributing the releases of Miss Pickford, Mr. Chapman, Mr. Fairbanks and D. W. Griffith? A. That is correct.

Q. And ever since the commencement of the company, the company has tried to handle quality feature pictures as distinguished from program or second feature type pictures? A. Yes.

Q. Mr. Lazarus, how many exchanges do you maintain in the United States? A. In the United States we have 26 (1946) exchanges. Six in Canada.

Q. Well, 26 in the United States? A. Yes.

Q. I think the testimony as to the other companies has been that they have 31 or 32. A. Well, there are several situations where other companies maintain exchanges in which we do not operate an exchange. For example, Portland, Oregon; we serve out of our San Francisco and Seattle offices. We have no exchange in Portland, Oregon. We have no exchange in Oklahoma City. We have no exchange in Memphis.

Q. Albany? A. Albany and New York has no branch office. That is four. That is a total of 30. Some of the other distributors may have exchanges in places like Butte. There was a time when some of the distributors maintained an office in San Antonio; some maintained offices in Jacksonville. We do not.

Q. And each year you have handled somewhere in the neighborhood of 20 to 26 pictures? A. In recent years that has been so, yes.

Q. Do you as a general rule have a separate contract for each picture for each exhibition and each theatre? A. That is correct.

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Q. Unless you make a contract like the 63 situation contract that is referred to in the Sudekam case? A. Yes, there are what are called blanket contracts which will cover all of (1947)

the situations operated by an operator who has more than one theatre, or the other exception would be—

Q. But for ~~only~~ one picture? A. For only one picture, except, for example, at the present time, we are distributing and currently marketing two pictures for one producer. I am referring to It's In The Bag and Guest Wife. There the same producer had the pictures; so if we can sell both pictures it is O.K. with him to have us put them both on one contract; but that is exclusively within one producer organization.

Q. During the year on an average how many exhibition contracts would cross your desk? A. Well, we average anywhere from ten to twelve thousand contracts on a picture; and my mental arithmetic isn't very good, but multiply that by about 20, and that would be of a current season's release. Now, we do not stop selling pictures when the picture is a year old; so I would say that our contract department and my desk clears all of that volume of business.

Q. Three to four hundred thousand contracts? A. Three to four hundred thousand contracts.

Q. Each year? A. Each year.

Q. And that is domestic only? A. United States and Canada only.
(1948)

Q. You classify Canada as domestic? A. Domestic.

Mr. Rafferty: Mr. Wright, will you make the same stipulation that if this witness were asked the same questions that, I believe, the first witness on the trial was asked as to conspiracy, he would give the same answers?

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Mr. Wright: It is so stipulated.

Mr. Raftery: Thank you.

Q. Mr. Lazarus, within this past week has United Artists had five pictures showing first-run on Broadway? A. Yes, I believe we have.

Q. Guest Wife? A. Guest Wife; GI-Joe is playing; Blythe Spirit is playing—

Q. Spellbound? A. Spellbound opens today. That is four.

Q. And at the Gotham. What is at the Gotham? A. Pardon me?

Q. What is at the Gotham? Paris Underground? A. Is Paris Underground still playing there? I knew it was in the house. I didn't know whether or not it had terminated.

Mr. Raftery: Are there any question?

Cross Examination by Mr. Proskauer:

Q. You had pictures showing first-run at five independent New York theatres in the last week? A. Yes, sir.

Q. Those are large Broadway theatres? A. Yes, they (1949)

are representative houses, representative first-run houses.

Q. And you sell first-runs to affiliated theatres also? A. Oh yes.

Cross Examination by Mr. Seymour:

Q. Do you license United Artists pictures to some of the theatre-operating companies in which Paramount has an interest? A. Yes, sir.

Q. Are you familiar with where the negotiations for these licenses are conducted? A. Well, I do not sit in on those negotiations myself but I know where the contracts come from to me. For example, any contracts for the Minnesota

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Amusement Company come in from Minneapolis. Contracts for the Kincey Circuit will come in from the Charlotte office, and so forth.

Q. Do you know whether it is generally the fact that the negotiations for the licensing of United Artists pictures in such of the theatres of the various operating companies as do license United Artists pictures are conducted with those companies at their home offices?

The Witness: I did not quite get your question.

Mr. Seymour: Will you read that, Mr. Stenographer.

Q. (Read.) A. With those companies at their home offices? Yes, that is correct.

Mr. Raftery: Are there any other questions?

(No response.)

(1950)

Mr. Raftery: All right, Mr. Wright.

Cross Examination by Mr. Wright:

Q. Mr. Lazarus, you have in United Artists a general sales manager, do you not, or somebody in charge of sales?

A. Yes, we have a general sales manager, Carl Leserman.

Q. And I suppose he is the man, is he not, who is in charge of the actual negotiation of contracts? A. Well, he does not actually negotiate many contracts. We have division managers, district managers, and a great—oh, the fewest—I would say that the fewest deals that have come into the home office are brought to Mr. Leserman's attention.

Q. Well, I just wanted to get what your sales setup was. You have your branch manager and your salesman in each of the branches? A. Yes.

Q. And then you have district managers over there too? A. District managers and division managers.

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Q. And the district managers are in the field? A. Yes, that is correct.

Q. And each one has a group of exchanges under him? A. That is correct.

Q. And then you have division managers too? A. Yes.

Q. And those are here in New York? A. They are located here in New York.

Q. How many do you have? How do you have it divided (1951)

up? A. We have three division managers here in New York.

Q. How do you divide your divisions? A. One of the division managers has supervision over the four southern offices. That is Charlotte, Atlanta, New Orleans and Dallas.

Q. Those are the four southern district offices? A. That is the southern district; and he also supervises our selling in Canada.

The eastern division manager has, I would say, roughly the branches located east of the Mississippi. That is not the exact setup, but that is roughly it.

Then we have another one who operates or supervises the branches in Chicago and the west.

Q. And on top of those is Mr. Leserman, the general sales manager? A. Yes.

Q. And he reports to whom? A. Well, Mr. Leserman's contact would be through me with the producer's representative.

Q. No, above him in the hierarchy in the company. A. Well, the hierarchy in the company would represent Mr. Sears, Mr. Raftery and the board of directors.

Q. That is, Mr. Sears is the vice-president in charge of sales? A. Yes, vice-president in charge of distribution.

Q. And Mr. Raftery is president? A. Mr. Raftery is president of the company.

Q. Now, in selling the independent exhibitors, that, I (1952)

suppose, is principally done by the salesmen and the branch

Paul N. Lazarus—By Defendant—Cross

managers in the branches as they solicit the business? A. Well, it all depends on the importance of the account, regardless of whether we would call it an independent exhibitor or what I have heard called an affiliated account, if the account is a sufficiently important account from the standpoint of revenue, then the district manager or the branch manager would handle it. The accounts of lesser monetary importance are handled by the salesmen.

Q. And I suppose the most important are the division managers? A. Well, they on occasion will go out in the field and negotiate with the district managers.

Q. Now, I think you gave us some figures on gross business on the picture *The Invaders*. Don't you have any breakdown in the United States? A. Pardon me, I didn't give you any figures on *The Invaders*.

Q. Oh, what was the picture? A. In Which We Serve. We did not release *The Invaders*. I know nothing about that.

Q. Well, you gave us a United States and Canadian figure. Don't you have your figures broken down between United States and Canada?

Mr. Raftery: To save time, may I interrupt? We did not distribute that picture in Canada, In Which
(1953)

We Serve. I am sorry that he said that. That is the domestic figure.

Q. In any event, you also released, did you not, a number of others of those pictures on the list that Mr. Frohlich put in evidence the other day? A. Some of those picture we released, yes.

Q. And can you give us the domestic grosses on those pictures? A. No, sir, I can't from memory. They are available but I have no—

Q. I say, could you get that for us? A. They could be obtained, certainly.

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Mr. Raftery: If you will give me the list I will phone up and get the figures.

Mr. Wright: Now, I shall ask to have this marked for identification.

(Marked Government's Exhibit 382 for identification.)

Q. I will show you this photostat of a letter from United Artists Corporation to Warner Bros. Circuit Management Corporation, dated September 30, 1936, and ask you if you recognize that as one of these so-called master agreements that were referred to on your direct examination? A: Yes, it appears to be a master agreement.

Q. And that covers all of your product for the 1936-37 season of all producers? A: Yes, with each producer's pictures stipulated by the producer named. (1954)

Q. I will call your attention to these provisions on page 3 as follows:

"The following is our understanding with reference to the eight pictures designated at 35 per cent"—

Mr. Proskauer: Mr. Wright, I would like to hear this, please.

Q. (Continuing) "The following is our understanding with reference to the eight pictures designated at 35 per cent:

"We are to receive 35 per cent if any or all reach the average gross attained by the two pictures from Fox, two from RKO, two from Paramount and two from Warner Bros. nationally designated to play at 35 per cent during the season of 1936-37. On those pictures designated at 35 per cent we are to receive 50 per cent of the excess receipts over and above the aver-

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age described above. On such of these 35 per cent pictures that do less than the above described average, the percentage is to be reduced down to the minimum of 30 per cent of the gross—in steps of one per cent of the film rental for each three per cent less than said average gross, computed in the same manner as the 30 per cent group outlined below.”

Now, that refers to grosses throughout the circuit?

(1955)

A. On those so-called yardstick pictures——

Q. Yes. A. Grosses for the same situations that we are selling for; I presume that is it.

Q. Well, your terms here just specify percentages and the agreement does not refer to any particular runs or theatres. I think the only agreement as to that is on page 4 here, is it not, with reference—— A. Well, as I stated before, Mr. Wright——

Mr. Wright: Let me finish.

The Witness: Pardon me.

Mr. Proskauer: Mr. Wright, is the paper you are reading from that letter that I handed Mr. Neisley yesterday or the day before? I can't hear you and I am trying to just identify what you are reading from.

Mr. Wright: The letter was obtained from Warner Bros. I do not know whether you handed it or someone else.

Q. I call your attention to this provision on page 4 with reference to playing time:

“It is understood that the eight pictures designated at the top terms are to have preferred playing time. Playing time for all other pictures is to be agreed upon between Mr. Bernhard and Mr. Schaefer in the event

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the local representatives of United Artists Corporation and Warner Bros. cannot agree.”

(1956)

Apparently this agreement simply left the actual determination of playing time with respect to amount of theatres to local representatives. A. Not the amount of theatres, Mr. Wright. It would leave the matter of whether or not a picture shall have preferred playing time or in situations where they have a flexible policy, how many days the picture shall play. If the local branch office and the local Warner bookers did not agree, then it could be referred to Mr. Schaefer and Mr. Bernhard.

Q. Well, I was trying to determine from the agreement the extent of the coverage there. I wonder if you could read it and tell me what theatres were supposed to be covered by the agreement? A. As I testified a little while ago, in the case of a master agreement of this sort, this is supplemented by so-called deal sheets broken down for each producer in which all of the theatres are listed, and the minimum playing time is included. So that this is merely a setting forth of the terms without the actual number of days to be played.

Q. I understand that merely sets forth the general terms, and it is to be supplemented by further specific agreements; but I wondered if you could tell me what the extent of the coverage in that general agreement before you is. That is, that is for the whole Warner Circuit. A. That is for the Warner Circuit.

(1957)

Q. And these percentages that are referred to in there are the percentages realized throughout the circuit, is that right? A. I believe it is a circuitwise percentage, although I am not sufficiently familiar with this particular deal at this late date to know whether this was situation per district or whether it was circuitwise. I would have to search a little further on that, Mr. Wright.

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Mr. Wright: I don't think I will be able to finish with this witness before lunch.

Judge Hand: All right. We will take a recess until 2:15.

(Recess to 2:15 p.m.)

AFTERNOON SESSION

PAUL N. LAZARUS resumed the stand.

Cross-Examination Continued by Mr. Wright:

Q. Now, Mr. Lazarus, this Exhibit 382 for identification, this master deal with the Warner Circuit I was examining you about before the recess, there is nothing unusual about that deal in so far as your dealings with the affiliated circuits is concerned, is there? A. I don't know what you mean by that, Mr. Wright.

Q. Well, you make similar master deals—

Mr. Davis: If the Court please, this confidential conversation does not get out into the room at all, and (1958)

I would be very happy if Mr. Wright would speak up.

Judge Hand: Yes. I think you will have to stand over there and make more noise, Mr. Wright. It is very difficult to hear you.

Mr. Raftery: Let us hear the question, please.

Q. (Read.) A. Well, this deal with the Warner Bros. Circuit in 1936 is not necessarily like any later deals that we have made with Warner's or any of the other circuits.

Q. I understand you have different terms, but even since then you have from time to time made master deals which cover the entire circuit— A. We might have made master deals—

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Mr. Davis: One at a time, please.

A. (Continuing) —that cover the entire circuit for one picture, for two pictures; but this is an old letter, and I, without going over it and comparing it with later deals, I would not want to make a statement of that sort.

Q. Let us take this Exhibit 272 that is in evidence. Those, I believe, are some deal sheets and relate to some 1943-44 pictures, are they not, that you licensed to theatres in Los Angeles, or Fox— A. Well, you have got one—you have got two pages here of deal sheets that cover Stage Door Canteen, one picture.
(1959)

Q. In Los Angeles first-run, is that right? A. In Los Angeles.

Q. Now, there is also a reference to a letter agreement there with a 1943 date, do you see that? A. Yes.

Q. It refers to it as attached, but it is not attached? A. Yes, but that substantiates what I said before, Mr. Wright, that these letters of agreement are substantiated by individual deal sheets for individual pictures which must be approved by the individual producer. That is what this is.

Q. I understand that; but I say that letter agreement that is referred to there, that actually is a letter agreement outlining general provisions which cover all of the theatres in the Fox Circuit, isn't it?

Mr. Caskey: No.

Mr. Raftery: Just a minute. You did not get that from us, did you?

Mr. Wright: That came from you, that is right.

Mr. Raftery: From our files?

Mr. Wright: Yes.

Mr. Raftery: Or from Fox?

Mr. Wright: From you.

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Mr. Raftery:—And nothing else came but that?

Mr. Wright: That came without the letter agreement attached. What we asked for was your first-run

(1960)

deal with Fox in Los Angeles, and we got the deal sheets but we did not get the master agreement.

Mr. Raftery: I told you a few minutes ago that I was sending someone to phone to try to find the letter.

Q. Well, in dealing generally with the theatres that are part of the Fox Circuit in the last few years, you have been accustomed to work out a so-called master agreement with Fox West Coast Agency which covers the general terms that are applicable to the Fox theatres in Los Angeles, those in San Francisco and those in Denver, and even those in Kansas City and Wisconsin, isn't that right?

Mr. Caskey: Objected to as calling for the contents of some document that is not here.

Judge Hand: Overruled.

A. This particular set of sheets, Mr. Wright, for the Los Angeles exchange covers first-run and move-overs for Stage Door Canteen. I do not see any other Los Angeles runs on that on Stage Door Canteen.

(1961)

Q. I understand that.

Mr. Wright: Will you read the question again?

(Question read.)

A. What I get, Mr. Wright, are the individual deal sheets for the different parts of these different territories that you have mentioned. If there is a master agreement in existence covering that, reference would be made on the deal sheets to

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that, and we would check it when the deal sheets are received, but I don't want to say offhand there is a letter of agreement covering all these things.

(Marked Government's Exhibit 383 for identification).

Q. Here is an agreement dated September 1, 1941, between United Artists and Fox-West Coast Agency Corporation, marked Plaintiff's Exhibit 383 for identification, and I will ask you to look at that and tell me if you do not recognize that as the kind of over-all agreement that you have been making with the Fox-West Coast Agency Corporation on behalf of the various Fox theatre operating affiliates. A. This is an agreement made for the theatres, according to this paper in the States of California and Arizona, which deal sheets are attached hereto and made a part hereof, so that the deal sheets must have been attached to this for this particular territory, and unless I see those—well, there are several pictures mentioned in here that are covered by those (1962)

deal sheets, and those deal sheets would list the theatres and so forth.

Q. This agreement also covers all the producers, does it not? A. The producers are given—I don't know whether that covers all the producers or not. There are several producers who are listed separately.

Q. Then this reference on page 6—

Mr. Caskey: Are you going to offer it, Mr. Wright?

Mr. Wright: I want to examine him on it first. We will offer it, if you want it.

Mr. Caskey: Wouldn't it be better if you offered it and let us see it first?

Mr. Wright: You may see it, if you like.

Paul N. Lazarus—By Defendant—Cross.

Judge Hand: Go ahead with your examination. If he wants to see it, of course—

Mr. Caskey: I haven't seen it.

(Mr. Wright hands a paper to Mr. Caskey.)

Q. Perhaps I misunderstood the agreement. I notice that on page 6a it refers to test situations in Kansas City, Milwaukee, St. Louis, St. Lake City and Denver, and then it has a list of control figures opposite individual towns in each of those exchange areas. Now, the rental terms set forth in the agreement are dependent, are they not, on what the picture does in these so-called test situations? A. I (1963)

would like to see that, Mr. Wright, before I answer the question, because I am not sure.

As I understand it, these control figures represent the gross that the picture is supposed to achieve at the box office for the playing time that is listed under the column "per tenth." And if my memory serves me correctly, there would be what was referred to earlier as a sliding scale, in the event that the picture exceeded or did not equal these control figures, so that the ultimate terms would be based on the box office performance of the picture up to a certain figure and down to a certain minimum.

Q. The rental that Fox paid, let us say, in the Los Angeles area, then, would be determined in part by the performance of the picture in the test areas listed there, isn't that right? A. Yes. Whether that would cover the area or the first situation, I don't recall. I imagine it would be the area.

Q. That was characteristic of your dealings with the Fox circuit in the last few years? A. I don't know whether we have that kind of deal at the present time or not or whether we have had it since. This was dated September 1941.

Paul N. Lazarus—By Defendant—Cross

Q. You do not yourself participate in the negotiations?
A. No, sir.

(1964)

Mr. Davis: If you are through with them, may we see them, Mr. Wright? You are not using this now?

Mr. Wright: I am offering it in evidence now.

Mr. Davis: If you haven't offered them, I will see them later.

Mr. Wright: I offer in evidence the agreement marked for identification as 383 and the one that Judge Proskauer has—

Mr. Proskauer: Take it and give it back to me.

Mr. Wright: (Continuing)—382 for identification.

(Government's Exhibits 382 and 383 for identification received in evidence.)

Judge Bright: Are those the so-called master agreements, both of them?

Mr. Wright: Yes, sir.

Judge Bright: With which companies?

Mr. Wright: 382, I believe, is a master agreement with Warner—that is, United Artists pictures in the Warner circuit, and 383 is a master agreement with Fox-West Coast Agency Corporation.

Mr. Proskauer: Mr. Wright, when you are through with 382 will you let me take a glance at it?

Mr. Davis: I would like to see both of them.

Mr. Wright: I think that is all we have with this witness.

(1965)

By Judge Bright:

Q. Mr. Lazarus, was there any master agreement with any other of the affiliated theatre group besides Warner and

Paul N. Lazarus—By Defendant—Cross

the Fox-West Coast? A. I couldn't answer that without looking up our records. It covers a long period of time, and I have no direct recollection.

Q. Have you any master agreements with any independents? A. At the present time we have no master agreement with any independent that I know of, although we sell on a similar basis to the independents, that is to say, the so-called sliding scale, where a picture is paid for on the basis of what it produces at the box office.

Q. Have you had any master agreements in the past with so-called independents? A. Well, if you consider a franchise as a master agreement, there have in the past been master agreements with a company down—

Q. I am talking about agreements like these last two exhibits. A. Yes. In Florida we had a master agreement with the Wometco Company operating in Miami and in Miami Beach.

Q. When was that? A. I think that has expired. That expired two or three years ago. It was for a period of two or three years, I believe. We had a franchise with the United Artists Theatre in San Francisco, which theatre we don't own, but that was the name of the theatre, United Artists Theatre.

(1966)

We had a franchise out there which has expired, and we had a franchise, I believe, in Portland, Oregon, with J. J. Parker. That has also expired. And that was for a number of pictures, for a season's product, or longer, and a similar agreement.

Q. Have you any of the licenses that were given to any independent theatres in the territory where Fox-West Coast operated during the period of this master agreement that has been offered in evidence? A. Well, I haven't any of those here, but, for example, I referred to Portland, Oregon. That is a territory in which Fox-West Coast or Fox Evergreen

Paul N. Lazarus—By Defendant—Cross

operates. That is the territory up in Portland and Seattle. We had a franchise there with J. J. Parker, which was a master agreement. And Fox does not operate in Florida, of course. San Francisco, we had a first-run agreement with the United Artists Theatre in San Francisco. Fox operates in that territory.

By Mr. Raftery:

Q. That was with Herman Cohen? A. Herman Cohen was the man with whom the license—the franchise was entered into.

By Judge Bright:

Q. Have you any license agreements here that were in effect at the same time as this Fox-West Coast master agreement, or with reference to the same picture? A. I have (1967) brought nothing with me. I don't know whether they are in evidence or not.

Mr. Raftery: The Government has put a whole group of them in evidence. I don't know the exhibit numbers and I haven't seen them. The Stage Door Canteen contracts are all in.

Judge Bright: What I am interested in finding out is whether or not rentals are similar to independents as they are under this master agreement with Fox West Coast with reference to the same picture.

Mr. Wright: I think we can clear that up by further examination. What we have put in evidence, if the Court please, were the deals, were samples at least, for the 1936-37 and the 1943-44 seasons that this company had made with each of the affiliates. What we offered as to the independents was simply the standard form. I take it, or at least I understood from the witness's examination on direct that—

Paul N. Lazarus—By Defendant—Cross

By Mr. Wright:

Q. In making your ordinary deal with an independent or small theatre operator, you simply write it up on your standard form of agreement and you sell him the picture for a particular run in a particular theatre at a particular admission price on either percentage terms or a guarantee against percentage or flat rental, isn't that right? A. I don't (1968)

recall giving that testimony.

Q. That is the fact, isn't it? A. Well, no, I don't remember that that question was asked of me. There have been cases—

Q. Is or is it not the fact? A. If you are saying generally, that is the fact generally, but there are exceptions as there were in the case of Portland, Oregon.

Q. I assumed that Judge Bright's question was addressed to the general practice.

Mr. Wright: Is that what you wanted?

Judge Bright: I wanted to see whether or not you gave the same terms to independents for this picture that you gave to the Fox-West Coast under this master agreement which has been offered in evidence here.

Q. Can you answer that question? A. I could not answer that question without seeing the documents.

Q. That is, the terms would vary from situation to situation— A. The terms would vary—

Q. (Continuing) —depending upon the kind of deal that was made? A. The terms would vary, not only pictures, but in different situations. I could not answer the question without seeing the papers.

Q. I assume in no case would the deal made with the independent be conditioned as this one is upon the performance of the pictures in certain Fox theatres, isn't that right?

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A. If it was with an independent, it would have nothing to do with performance in the Fox theatres.

(1969)

Q. It would be generally based on the performance of the picture in his particular theatre, is that right? A. That is correct.

Judge Bright: I did not have any idea that his payment of rental on an independent theatre would be based on performance in any other theatre.

Mr. Wright: I was simply pointing out what I regarded as one of the unique features of this particular agreement.

You say you wish to know whether there were any similar rental terms given to an independent. I assume from the witness's answer that clearly as to that particular term that was not in any independent's contract.

Judge Bright: You mean the compensation here was based upon the performance in some key theatre in that exchange?

Mr. Wright: Well, a series of key theatres in several exchange areas. The performance there determined the classification of the picture, and that, in turn, determined how much film rental was to be paid.

Judge Bright: What I had in mind was whether or not if they say they are to pay 35 per cent of that return—that is, Fox West Coast is to pay 35 per cent of that return for the use of that picture, whether or not an independent showing the same picture on the same run was charged 35 per cent or more, or less.

(1970)

Q. Can you answer that?

Mr. Caskey: San Francisco first-run and Los Angeles first-run, Mr. Lazarus.

Paul N. Lazarus—By Defendant—Cross

The Witness: I would not attempt to answer that question from memory, because I can't.

Mr. Caskey: Or Portland first-run or Los Angeles first-run.

The Witness: I could not do that without reference to my records.

By Mr. Wright:

Q. In any event, I take it; Mr. Lazarus, there is no attempt even at uniformity of treatment in percentage or rental terms as between affiliated theatres and independent theatres, isn't that right? A. We don't recognize any difference. I try to get as much revenue for each of our pictures as we can, Mr. Wright, regardless of who buys it.

Q. That is right. You get the best terms that you can from any independent that you do business with, or anybody else, and you may come out with results which vary widely from situation to situation, isn't that right? A. Yes. With us, exhibitors are exhibitors, regardless of whether they are independent or affiliated.

Q. And you do not have any standard formula on which (1971) you would offer to sell the independent pictures in any particular situation, isn't that right? A. We have no fixed formula to begin with. When we know something about a picture, Mr. Wright, we try from all theatres to get the maximum that we can.

Q. Yes. You get just as much out of every one that you can, and I suppose how much you get out of any particular exhibitor depends on whatever bargaining strength he has got as against the bargaining strength you have got, is that right? A. No, it depends on what the picture does at the box office. That is what ultimately decides what we get; and even within one group of theatres, as you refer to them there, the results may vary widely from town to town.

Paul N. Lazarus—By Defendant—Cross

Q. I think Judge Bright was referring to the question of the particular percentage that you get on a picture. That varies from account to account, isn't that right? A. You mean the percentage terms on which the picture may be sold to begin with?

Q. That is, you may charge one exhibitor 40 per cent for a picture that you charge another exhibitor 35 or 30 per cent for, isn't that right? A. That is correct, as between one exhibitor and another exhibitor.

Q. Yes. A. That is correct.
(1972)

Q. There is no uniformity of percentage terms? A. There is a uniformity in our effort to begin with before a picture has actually demonstrated its value at the box office. Then you frequently try to get percentage terms, which you can't get because the picture has not measured up to your requirements.

Q. And you always attempt to get the maximum percentage you can from everybody? A. Yes.

Q. And your results vary widely in that respect? A. Yes.

Q. And they vary in the bargaining power of the various exhibitors involved, isn't that right? A. No, they vary based on the box office results.

Q. I am talking about the amount of percentage. A. Well, the amount of percentage on a sliding scale varies, depending on the business that the picture does. I mean, if you have a contract like these contracts you have shown me, the percentage terms, the ultimate percentage terms will vary, depending on the business that the picture does.

Q. And it is also true that the actual percentage terms that you get from theatre to theatre vary widely? A. From theatre to theatre, they do vary.

Judge Bright: You mean what you get varies?

The Witness: What we get varies, and also on occasion the initial terms on a contract vary. There

Paul N. Lazarus—By Defendant—Cross

(1973) are some theatres that you just simply cannot get the

asking terms for, and there are some pictures which do not live up to your original estimate of their value, so that if we start out to sell a picture, for example, at 35 per cent of the gross, that does not mean that you are going to be successful in all situations in getting 35 per cent of the gross. In other words, it is not a matter of 35 per cent of the gross or we don't make a deal. Ultimately we try to sell every account that we can.

Mr. Caskey: Mr. Wright, are you sure that this page 6-A was clipped in the original?

Mr. Wright: As far as I know, this is the way it came to me. You, I assume, have the original copy, don't you? I would be glad to have that substituted for this.

Mr. Caskey: It is on different paper.

Mr. Wright: Why don't you get the original then. Let us withdraw it and put the original in if there is any question at all about its authenticity.

Mr. Caskey: I think we should.

Mr. Baffery: I haven't got the original.

Mr. Proskauer: May I ask a question, with your Honor's permission.

By Mr. Proskauer:

Q. I want to develop a little more what I understand was implicit in Judge Bright's questions. When you start

(1974) out to sell a picture, you determine what percentage of gross you would like to get? A. That is correct.

Q. Now then, when the picture begins to be sold, you discover sometimes that in certain situations you can ask a

Paul N. Lazarus—By Defendant—Cross

larger percentage, and sometimes you are unable to get the percentage you start out with, and you have to take a smaller percentage? A. That is correct.

Q. Now is that difference in percentage determined by the fact whether an exhibitor is an affiliate or an independent? A. No, sir.

Q. That has nothing to do with it, has it? A. No, sir.

Q. It depends on factors like these, does it not, the box office of a picture, the character of the theatre, the seating capacity of the theatre, and the general admission price policy of the theatre, and various other business factors of that kind? A. That is correct.

Q. And you do not make one price for an independent and another price for an affiliate? A. No, sir.

Q. You make different prices, depending on these other factors that I have imported into my questions? A. Yes; those factors all enter into the price you can get.

Q. Now, I want to refer for just a moment to this Exhibit 382. That is the kind of thing you refer to as a master agreement, isn't it? A. Yes.

(1975)

Q. Now, without going into all the general terms of it, I call your attention to this phrase on the last page: "Deal sheets are to be worked out in each individual situation."

Now, have you got that in your mind? A. Yes.

Q. And what this so-called master agreement does is it outlines a general plan on which pictures that are to be sold under it are to pay and how they are to run, and certain other general terms that are to be applicable to all pictures sold under this agreement? A. Yes.

Q. But no picture is actually sold under the agreement until the deal sheet is signed? A. That is correct, and in our case until the producer has approved the deal; the producer for his own picture.

Paul N. Lazarus—By Defendant—Cross

Q. In other words, the so-called master agreement is a kind of general chart which is made effective contractually when you actually sign the deal sheet and have it O.K.'d by your producer? A. Well, the deal sheets are a definite part of that because the master agreement does not give theatres, does not give playing time or any of those details.

Q. Yes, but when you sign the master agreement, you may sign that before any deal sheets are executed? A. The deal sheets are executed as a result of the master agreement. (1976)

Q. I am agreeing with you, but I want to get it clear on the record, because I know it, and I am not sure their Honors know about this. You ordinarily sign a master agreement in point of time before you sign the deal sheets? A. That is correct.

Q. And after you sign the master agreement nothing has really happened until you sign the deal sheets? A. That is correct.

Q. And then you take up the question of what particular picture and what particular run of that picture, and so forth, is to be brought under the master agreement and you determine that by executing the deal sheets? A. Well, I don't quite follow you, Judge Proskauer, in the matter of what particular pictures are to come under the master agreement.

Q. Well, I will leave that out. The master agreement sets forth certain pictures that are to come under it? A. That is correct.

Q. But in point of fact there is no actual contract with respect to that picture, no commitment, until the deal sheet is subsequently signed?

Mr. Wright: If the Court please, the agreement is there. It speaks for itself. It clearly on its face does commit the pictures to the circuit, the terms to be worked out in the form of deal sheets.

Colloquy

(1977)

Judge Bright: The terms are on the deal sheets.

Mr. Wright: The individual terms.

Judge Bright: As I get Judge Proskauer's inquiry, there is no specific knowledge as to just when the picture is to be played or how it is to be played until after the deal sheet has been executed.

Mr. Wright: That is right. All that the agreement does, right on its face, is to commit the pictures to the circuit. That, Judge, is done right in the master agreement. And the general terms—

Mr. Proskauer: I will call your attention to the terms of this agreement rather than have it argumentatively put in questions.

Judge Bright: That is the master agreement?

Mr. Proskauer: This is the master agreement, he said. It says, "I am reducing to writing the understanding of the discussion we have had concerning United Artists product for the year 1936."

Then it says: "There are 26 pictures covered" by it, and it lists the pictures.

Then it goes on to list under them the groups of pictures, say, six Wanger productions, two at 35 per cent, two at 30 per cent, and two at 25 per cent. That is typical of the various groups.

Then it goes on to set forth a schedule of how they

(1978)

are going to compute which pictures shall pay 25 per cent and which pictures shall pay 30 per cent, and which pictures shall pay 35 per cent, those terms having reference to the average gross attained by the picture in certain described situations.

Then it describes what is to be done about a double feature allowance on 35 per cent pictures, and a double feature allowance on 30 per cent pictures; and I

Paul N. Lazarus—By Defendant—Cross

assume your Honors know what the double feature is; I do not think we have to go into that.

Then the double feature allowance on the balance of the project.

Then playing time. It is understood that eight pictures designated at the top terms are to have preferred playing time, and playing time for all other pictures is to be agreed upon between Mr. Bernhard and Mr. Schafer in the event that the local representatives of United Artists and Warner Bros. cannot agree.

Then, it says deal sheets are to be worked out on each individual situation.

Q. Now, with that description to the Court that I have given, what is contained in the deal sheets that are subsequently worked out? A. The deal sheets show each situation, each theatre that is going to play the picture; the number of days; if the picture is to have preferred playing time that is so indicated; and I believe the terms are repeated on the deal sheet if the terms have been determined at the time the (1978a) :

deal sheets are made out.

Judge Bright: Clearance and rental?

The Witness: Rent.

(1979)

Q. The clearances are generally understood, are they?

A. Yes, they are understood, and they follow along our established custom.

Q. Now, you have told the Court, as I understand it, that you have made master agreements in some instances with independent? A. Yes.

Q. Does the fact that a theatre chain like these Warner theatres here is affiliated or not affiliated have anything to

Paul N. Lazarus—By Defendant—Cross

do with whether you make a master agreement or not? A. No; we have made master agreements with independents.

Q. The situations in which you make master agreements are, generally, situations in which the customer has a number of theatres? A. Wometco Circuit has a number of theatres; in Portland, Oregon, there were several theatres involved in that deal, in the City of Portland—

Q. What I mean is this; You do not usually make a master agreement with respect to a single theatre? A. A single theatre? No.

Q. And the situations in which you make these master agreements are those in which the customer has a number of theatres, and you are trying to put down in writing a general understanding that will cover a number of theatres? A. That is correct.

Q. And that is to save the burden of putting into every (1980)

particular deal sheet all of these terms? A. That is correct.

Q. So you make the so-called master agreement; and then you consummate it by deal sheets with that customer with respect to each individual theatre? A. Yes, sir.

Q. And whether or not that customer is an affiliate or a non-affiliate does not enter into the picture at all? A. No.

Judge Bright: In answer to one of my questions when I asked you whether you made master agreements with independents, you said, "Do you mean franchise agreements?" Well, what is the difference?

The Witness: Well, that term of master agreement and franchise has been rather promiscuously used in the picture business. I mean by a franchise as you would mean by a master agreement, an agreement that covers more than one picture for perhaps one year or maybe for two years, if it is possible to sell the season's product in advance. It is a commitment prior to release of the pictures.

Colloquy

Judge Hand: Of course, franchise, I think, as it has been used here before, refers to the time contracted for and not the number of pictures.

The Witness: No, it would be for the period of time.

Judge Hand: Yes.

(1981)

Judge Goddard: How about the territory?

The Witness: Well, for a specific theatre or specific number of theatres.

Mr. Proskauer: Your Honors know, of course, that since the consent decree—I think this is not controversial—there have been no franchises issued since the consent decree.

Judge Hand: Yes, I know.

Mr. Wright: There have been no franchises made for the pictures of the five consenting defendants—

Mr. Proskauer: Yes.

Mr. Wright: There have been franchises made, however, on behalf of the theatres of those five consenting defendants with other distributors.

Mr. Proskauer: Yes. I meant exactly what Mr. Wright said, that the five consenting defendants have not made any franchises since the consent decree.

Mr. Caskey: Mr. Wright, I think this document is not an integral one. I am told that at your request the clerk clipped together certain papers, which I think on their face do not belong in it.

Mr. Wright: If there is any question at all about it I will withdraw it and you produce the original.

Mr. Caskey: Well, but do you understand it has to come from Los Angeles? This is the first request

(1982)

for it.

Paul N. Lazarus—By Defendant—Redirect

Mr. Raftery: We are trying not to go to Los Angeles. That is the first time I ever saw the document, and it is on this face not right, and we are trying to get it from uptown.

Mr. Caskey: In order that there will be no confusion in the record let us physically have this withdrawn.

(Government's Exhibit 383 for identification withdrawn.)

Redirect Examination by Mr. Raftery:

Q. Mr. Lazarus, Judge Bright asked you some questions about Stage Door Canteen's contract—I do not know the number of the exhibit—with ~~Fox West Coast~~, first-run, Los Angeles. As a matter of fact, Mr. Lazarus, the photoplay Stage Door Canteen was not offered for sale to anybody until after the picture was completed and first exhibited in the Capitol Theatre, New York City? A. That is correct.

Q. That was contract No. 1? A. Yes, sir.

Q. And it was sold throughout the United States to approximately how many thousand accounts, do you know?

A. I think it is about twelve thousand accounts now. I may be a little high, because our terms were a little stiff on that picture; but it would be something in the neighborhood of (1983)

eleven or twelve thousand contracts.

Q. And you sold that picture separately and individually to all the theatres that played it? A. Yes.

Q. And at varying terms? A. Yes, sir.

Q. What did you start out asking exhibitors for for that particular picture? A. What we started out to get?

Q. Yes. A. Well, we started out to get 50 per cent. of the gross receipts.

Q. And did you succeed in getting 50 per cent? A. In some cases.

Paul N. Lazarus—By Defendant—Redirect

Q. As a matter of fact, what did the picture gross domestically? A. I think it was something like four million dollars, if I remember correctly.

Q. Will four million three refresh your recollection? A. Well, it was over four million, Mr. Raftery. I do not know the exact figure, the latest.

Mr. Proskauer: '\$300,000 does not mean anything in this business.

Q. And that picture later played pursuant to the contract that Mr. Wright has put in evidence first-run in the City of Los Angeles? A. Yes, sir.

Q. I show you Exhibit U-A-1 and call your attention to the City of Los Angeles. Will you please advise us at what theatres it played first-run and move-over, and what rentals (1984)

were paid by Fox or National Theatres, or whoever it is who runs those theatres, to United Artists? A. It played beginning July 8, 1943, at the Carthay Circle, the Ritz, Loew's State and Grauman's Chinese; and it played those theatres July 8 to the 14th, and we received the following film rentals from those four theatres:

Carthay Circle, \$3,691.29; the Ritz Theatre, \$3,836.18; Loew's State, \$10,050.79; Grauman's Chinese, \$6,081.57.

Then on a move-over beginning July 15th it played the United Artists Theatre on which we got a rental of \$5,408.95; the Wilshire, on which we got \$2,080.93; and the Four Star, which played a long move-over—it played from July 15 to August 25, giving us a rental of \$7,262.92.

Q. Now, the picture played first-run in San Francisco, did it not? A. Yes, it must have.

Judge Bright: Would you mind telling me who owned or operated the seven theatres that you just referred to?

Paul N. Lazarus—By Defendant—Redirect

The Witness: Those theatres, I believe, are all operated by Fox West Coast. I am not positive of that without reference.

Mr. Raftery: Your Honor, we do not know the physical operator, but it played pursuant to the agreement with the Fox West Coast Agency that was put in evidence here.

Mr. Wright: The one referred to here I don't think is in evidence. All that is in evidence are the sheets. The letter agreement that is referred to is not in evidence. That I understand is one of those you were looking for.

The Witness: Mr. Raftery, I don't find the San Francisco figures here. I don't know that—oh, wait, I beg your pardon, it is abbreviated.

It played the United Artists Theatre in San Francisco, and the run began July 15 and ended on August 22, giving us a film rental of \$47,964.84.

Q. That was with Blumenfeld? A. Yes; that was the single theatre run with Blumenfeld.

Q. And you played Oakland? A. Yes. We played Oakland. We played the Paramount Theatre, Oakland, from August 12th to the 25th, to a film rental of \$16,280.55; and then moved to the Franklin Theatre in Oakland, August 26th to September 15th, and we got a film rental of \$3844.82.

Q. Blumenfeld, the independent, operates at San Francisco, is that right? A. Yes.

Q. And this Paramount house is a Fox West Coast house? A. Yes.

Q. And Blumenfeld takes clearance over Oakland? A. Yes.

Paul N. Lazarus—By Defendant—Redirect

(1986)

Q. Oakland followed San Francisco? A. Yes.

Q. How many contracts, if you remember, did you have on Stage Door Canteen? A. I think we had something over 12,000 contracts on Stage Door Canteen, but I am not positive.

Q. And those contracts will indicate the exact terms upon which each engagement was played? A. Yes, sir.

Q. And have you got those contracts available? A. We have them on file in our office.

Q. And they are open to inspection of the Government at any time they want to go up and look at them? A. Yes.

Q. Mr. Lazarus, there was a time in United Artists where the general practice was to license the exhibition rights before the pictures were actually available in the exchanges, isn't that right? A. Yes, sir.

Q. Now, at the present time and for some time past what has been the practice of United Artists generally? A. The practice generally on the part of United Artists in the last few years has been not to sell a picture until the picture was completed.

Q. Is it your practice to have test engagements of pictures before you determine the selling policy? A. Oh, we do that once in a while, but it is not our general practice.

Q. Well, is it the practice when you are in any way doubt-

(1987)

ful about the box office character of the picture? A. Yes; if a picture—if there is very much of a difference of opinion between the folks in the home office, we will play 10 or 12 engagements throughout the country to, as we say, get the feel of the picture so we know what kind of a picture we have from the standpoint of public reaction.

Q. And this selling after completion of the picture has added considerably to the cost of selling, has it not? A. Yes, because particularly with United Artists we get our pictures

Paul N. Lazarus—By Defendant—Redirect

delivered by our producers at irregular intervals. In other words, we can't start selling a picture until the producer tells us to go ahead, and they do not produce on a schedule, so that we have had periods of two or three months or four months, I believe, at one time, when we did not have a release; and then we will get two or three of them at a time.

Q. Have you such a consistency of releases that you can keep any exhibitor going in business? A. No, sir. We could scarcely keep ourselves going at times.

(1988)

Q. As a matter of fact, from Labor Day, 1943, until after Christmas of that year you did not have a single feature picture for release, did you? A. I don't remember that exactly, Mr. Raftery, but I know that for months on end we have been without a picture. We have re-issued pictures in order to keep the wheels turning.

Q. Have you ever stopped selling pictures? A. We stop selling a picture when—the only time we stop selling a picture is when the producer withdraws the picture from circulation. If he will permit us to continue the distribution of the picture, even after the terms of the distribution contract with the producer expire, we will keep on selling that picture.

Q. As regards these clearances Mr. Wright was asking you about, do clearances individually come to your attention? A. No, sir. They may or may not appear on contracts, but I never bother with the clearance. The only time a clearance will come to my attention is if there is something about the sale that is affected by a change in clearance. Then the branch manager submitting the contract, in order to explain why the contract terms may not look right in comparison with our records of previous selling in that situation, he may then explain that there has been a change in clearance, but otherwise I take it for granted that the clearance is in accordance with the established practice.

(1989)

ance is in accordance with the established practice.

Paul N. Lazarus—By Defendant—Recross

Q. It is the changes that come to your attention? A. That's all.

Q. These changes that have been brought about—by the way, you are not a party to the consent decree arbitration system? A. No, sir.

Q. When there have been changes made on the five or any one of them, by one of these arbitration boards, does that result in a change in your situation as regards clearance as a rule? A. Yes, I have had numerous letters from the branches in the last three years in which they have explained that a theatre clearance, that we had been working under for a previous period, whatever it may have been, was now changed as the result of an arbitration finding.

Q. So even though you were not a party— A. Even though we are not a party to it, there is nothing we can do about it.

Q. If you want to sell that account you have to sell him with the new clearance? A. That is correct.

Q. In your company the sales managers has no power to approve finally a contract? A. No, there is nobody in United Artists Corporation to my knowledge who has any authority to approve a contract. That approval rests entirely with the producer or his representative.

(1990)

Q. And has to go through you and then to the producer? A. That is correct.

Recross Examination by Mr. Wright:

Q. With respect to clearance, what you do in connection with the clearance under which you are serving an exhibitor, after an award comes down as to the other distributors, it depends to some extent, does it not, on how much bargaining strength that particular exhibitor has, isn't that right?

A. No; I don't recall a single instance, Mr. Wright, where

Paul N. Lazarus—By Defendant—Recross

we have been able to operate in defiance of a changed clearance; at least, none has come to my notice at my desk.

Q. You don't recall now situations where a certain exhibitor, let us say, has insisted on your continuing to hold some smaller competitor 30 days behind him after there has been an award reducing the other distributors' clearance from 30 to 14 days? A. I know, I said, of no such case.

Q. Would you say that never had happened? A. No, I know of no such case. Those things only come to my attention when there is a change in clearance that affects our selling, and I wouldn't know.

Q. Don't you know it is a fact that in certain exceptional situations the exhibitor has been able to get from you and continues to get from you a longer clearance on your pictures than the arbitrator or the appeal board determined was reasonable upon the distributors' pictures that were arbitrated? A. I don't know of any such case, no, sir. (1991)

Q. You don't know whether there was or not? A. I don't know. No, I do not know. That is a phase—

Q. That can easily be established by simply an examination of particular contracts? A. Yes, if it exists, it exists, but I don't know of any such case.

Q. Getting back to this master agreement, as far as this particular exhibit 382 is concerned, even after you make the deal sheets, there is no final settlement of the rental under this deal, is there? A. The final settlement of the rental is dependent upon the performance of the picture.

Q. Not only dependent upon the performance of your pictures, but, under these provisions on the third page, it is dependent upon the performance of two pictures from Fox, two from RKO, two from Paramount and two from Warner in the circuit, isn't that right? A. It is still dependent upon the performance of our picture, Mr. Wright.

Paul N. Lazarus—By Defendant—Recross

Q. Yes. A. Because I happen to know enough about those negotiations to know that in attempting to set terms with any—that is the Warner Circuit—in attempting to set terms with the Warner Circuit the matter of terms is always a matter that is open to dispute between the seller and the buyer, and, in order to establish whether or not the picture (1992)

is entitled to top terms, when we are asking top terms for a picture, they agreed to use a standard, practically might be called a slide rule. They took from each of these companies mentioned in that top grossing picture, they averaged the results of those top grossing pictures, and if the pictures that we claim were top grossing pictures could achieve those grosses, then we got their top terms.

Q. I say, before it was determined what your final film rental was actually going to be, you had to determine what the performance or box office returns were in the Warner Circuit from those two pictures that were selected? A. Yes.

Q. For purposes of control from each of the other distributors? A. We had to prove it was a top picture. That is what it means, really. If we claimed it was a top picture, we had to prove it.

Q. The process by which you did it was to wait and see how its performance compared with that of the two pictures from each of the other four distributors named? A. That is correct.

Q. And then there was a final settlement on rental to you? A. That is correct.

Mr. Proskauer: May I ask the Court, is it perfectly clear to your Honors that the reference to the other producers here, as Mr. Wright's questions indicate, was merely to establish a criterion by which it (1992a)

should be determined whether his picture was a top

Harry J. Muller—By Defendant—Direct

bracket picture, in which event he was to get 35 per cent, or another bracket picture in which he was to get 30 per cent. If it did as well as the average of certain other pictures, then he was in the 35 per cent class. If it did not do as well, or did something else, then he was in the 30 per cent class.

(Witness excused.)

(1993)

HARRY J. MULLER, called as a witness on behalf of the defendant United Artists, being duly sworn, testified as follows:

Direct Examination by Mr. Raftery:

Q. Mr. Muller, you are the treasurer of United Artists Corporation? A. I am.

Q. And you have been for some years? A. Yes.

Q. Prior to that you were comptroller? A. That is correct.

Q. This morning I read from a document which I identified as the original contract between Bing Crosby Productions, Inc. and the United Artists for the distribution of John L. Are you the custodian of the records of United Artists Corporation? A. I am.

Q. I ask you if that is the original document? A. It is.

Q. Under which United Artists is distributing the Great John L.? A. It is.

Mr. Raftery: Mr. Wright, with your indulgence, instead of offering it in evidence, I am content with what was read into the record.

Mr. Wright: I think that is agreeable providing, of course, we have the right to read in, at some later

Harry J. Muller—By Defendant—Direct

date, something that we might want to bring to the Court's attention.

(1994)

Mr. Raftery: Any time.

Q. Mr. Muller, in connection with the distribution of pictures by United Artists Corporation, have you the records showing the domestic results of distribution for the first 42 weeks of 1945? A. Yes.

Q. Without disclosing any figures, and subject to Mr. Wright checking them, if he wishes to, what have you to say as to whether this is the largest year United Artists has ever had since it was formed in 1919, using that period as the barometer? A. It is the largest year up to this date.

Q. In connection with your costs of distribution, have your costs been computed by you on the second sheet? A. Yes.

Q. By the way, that document you have before you is a document prepared every week and kept by you in the regular course of business, is it not? A. Yes.

Q. Has there been an increase in costs of domestic operation during this year over last year? A. Yes, sir.

Q. Is that cost substantial, I mean, the increase? A. A little over 10 per cent.

Q. What about last year over the year before? A. That also was greater than the year before.

Q. Has there been a progressive increase in the costs of domestic distribution of motion pictures during the past ten (1995)

years? A. Yes, although in some years we may have had a reduction in costs.

Q. Those were the years that we might refer to as the lean years, when we did not have pictures? A. That is correct.

Harry J. Muller—By Defendant—Direct

Q. But during the years we had the average number of pictures— A. Costs have increased.

Q. Particularly as regards advertising, have advertising costs gone up? A. Yes, they have.

Q. And how does your advertising cost for the year 1945, to date, compare with the corresponding period of last year? A. It is up about 35 per cent.

Q. You have had wage increases due to union contracts and other things during the past year? A. Yes.

Mr. Wright: If the Court please, I don't understand the purpose of this. If it is to show what his profits are, I suppose we ought to have the profit figures themselves. I do not see what conclusion the Court can come to just from the statements about increases in costs and increases in gross. I don't see what relevance it has to any issue that is being tried.

Judge Hand: What does it have?

Mr. Raftery: It has this, to show that an independent producer, or an independent distributor, rather, has had to have increased grosses to meet in-
(1996)

creased costs and that this year is the biggest year in our history, rather than that we are passing out because of any squeeze. I will stop right here on that. I don't want to disclose these figures, to be perfectly frank with you.

Q. Mr. Muller, the United Artists Corporation has three stockholders, has it not? A. It has.

Q. You are the custodian of the stock ledger and the stock record book? A. Yes.

Q. It is not a public company in any way? A. It is not.

Q. And it operates not only in the United States but throughout the rest of the world? A. That is correct.

Harry J. Muller—By Defendant—Cross—Redirect

Q. Branch offices and subsidiary corporations throughout the entire world? A. Yes.

Q. It does not own any interests direct or indirect in any of the seven other defendants, does it? A. No, it does not.

Q. It is wholly independent of any one of them? A. Yes, sir.

Cross-Examination by Mr. Wright:

Q. Mr. Muller, you had or you recently acquired a half interest, did you not, in some theatres that are operated there in Los Angeles? A. Yes, we did.

Q. You made an arrangement; that is where Mr. Blumenfeld operates four theatres for you and that you have a half (1997)

interest in the operation? A. It is not quite a half interest.

Q. And those theatres, when were those acquired? A. I think it was last July.

Q. And you acquired those theatres for the purpose of getting an adequate first-run outlet for your pictures in Los Angeles? A. I don't know the purpose for which they were acquired.

Q. But since you have acquired them you have shown the United Artists pictures there first-run day and date in the four theatres, isn't that right? A. I presume so, but that is not my field.

Redirect Examination by Mr. Raftery:

Q. In connection with the theatres that Mr. Wright speaks about, Mr. Blumenfeld is the full and complete operator of those theatres, is he not? A. He is.

Q. You have nothing to do with the operation in any respect? A. No.

Q. You have no film commitments of any kind or character to those theatres? A. No.

William A. Scully—By Defendant—Direct

Q. As a matter of fact, don't you know, Mr. Muller, that Spellbound, in addition to opening here today, is opening in the Fox West Coast house in Los Angeles tomorrow? A. I didn't know that.

Judge Hand: Any more questions of this witness?

Mr. Raftery: No.

(1998)

Mr. Raftery: May I ask Mr. Wright a question in private?

(Discussion between Mr. Raftery and Mr. Wright.)

Mr. Raftery: Mr. Wright has stipulated that if the president of United Artists were called to the stand he would testify in response to the, shall we call it, the Adolph Zukor questions in the same way that Mr. Zukor did.

I have some loose ends, but I will go ahead with Universal for the moment.

WILLIAM A. SCULLY, called as a witness on behalf of defendant Universal, being duly sworn, testified as follows:

Direct Examination by Mr. Raftery:

Mr. Proskauer: Your Honors, could I ask whether we are going to sit on Monday? There has been some talk around that we were not. I am not asking that we should not. I am just trying to find out whether we are going to.

Judge Hand: Oh, yes, we will sit on Monday.

Mr. Raftery: May I have five minutes, your Honor?

Judge Hand: Yes.

Mr. Raftery: Before I start on Universal.

(Short recess.)

William A. Scully—By Defendant—Direct

Q. Mr. Scully, where do you reside? A. Forest Hills, New York.

(1999)

Q. Are you associated with the defendant Universal?

A. Yes, sir.

Q. Will you tell their Honors in what capacities? A. I am the vice-president and general sales manager of Universal Pictures Company, Inc.

Q. Have you a similar position with Big U? A. Yes, sir.

Q. Will you tell their Honors the different functions of Big U and Universal Pictures Company? A. Big U is a separate company operating the New York exchange. The Universal Pictures Company, Inc. is the parent company that owns the Universal Film Exchanges, Inc. and operates 30 other exchanges in the United States.

Q. How many did you say Big U operated? A. One.

Q. Where is that located? A. At 630 Ninth Avenue, New York City.

Q. What area does that serve? A. New York and part of New Jersey.

Q. Where does Universal Film Exchanges function? A. In 31 branches throughout the United States.

Q. Located from Boston on the East to San Francisco on the West? A. Yes.

Q. And you have exchanges generally in each of the cities that the five defendants have exchanges in? A. Yes, sir.

Q. What does your organization consist of, I mean (2000)

division manager, etc.? Will you break it down for their Honors? A. We have one assistant general sales manager, three division managers, nine district managers, 31 branch managers and 95 salesmen.

Q. Where are your pictures made? A. In Universal City, California.

Q. At the Universal Studios? A. Universal Studios.

William A. Scully—By Defendant—Direct

Q. Who is in charge of the studios? A. Mr. Clifford Work.

Q. How many feature pictures a year do you generally produce? A. 45 to 50.

Q. Do you produce anything else? A. Seven Western pictures, four serials, 15 2-reel subjects, 30 single-reel subjects and a newsreel.

Q. How many issues of your newsreel? A. Two issues.

Q. Each week? A. Yes.

Q. Or 104 a year? A. Yes.

Q. How long have you personally been in the motion picture business? A. Since 1917.

Q. Where did you start in the motion picture business? A. I started as a salesman for Famous Players-Lasky in New Haven, Connecticut.

Q. In what other cities have you operated before you came into New York? A. I operated as a branch manager for Metro in New Haven and a district manager for Metro (2001)

Goldwyn-Mayer in New York City.

Q. When did you join Universal in your present capacity? A. January 1, 1938.

Q. Approximately what was Universal grossing when you first joined the company per year? A. Domestic?

Q. Domestic only. A. Ten million dollars.

Q. Has the gross remained static during your tenure of office? A. No, sir.

Q. What has happened? Will you tell their Honors generally? A. We have increased our gross considerably each year up to the present year, or last year, when our gross was \$31,000,000 domestic and Canada.

Q. Canada represents what part of that 31 million? A. About a million eight or nine.

Q. So, approximately, between 29 and 30 million dollars was your gross for 1944? A. Yes.

William A. Scully—By Defendant—Direct

Q. Those figures are all a matter of public record, are they not? A. Yes, sir.

Q. What have you to say as to the quality of the product that you have been handling in relation to the product prior to the time you took the office as general sales manager?

A. Our product has got better, we have made deals with different directors and producers to make top pictures, and each year we have been successful in making a little better (2002)

picture and that has contributed greatly to our increased gross.

Q. You have developed some of your own stars during this period, have you not? A. We developed personalities such as Abbott and Costello, a girl by the name of Montez, and another girl by the name of DeCarlo, and Deanna Durbin was making pictures for Universal when I entered the company.

Q. Has Miss Durbin's popularity increased since you entered the company? A. Yes, sir.

Q. Generally, you are making a better quality picture and have been making progressively better quality pictures, since 1937? A. Yes, sir.

Q. How do you generally license the exhibition of your pictures to exhibitors? A. We offer all our pictures to the exhibitor at one time together with our newsreel and short subjects, and we generally offer him 55 feature pictures, 7 Westerns and our shorts and newsreel.

Q. Do you offer them all on one contract or separate contracts or how do you offer them? A. We have 50 pictures offered on one contract, and we have five pictures that we sell on separate contracts, two as specials and three as outside producers' productions. Our Westerns and shorts are all in the same contract as the 50 feature pictures and our newsreel is on a separate contract.

William A. Scully—By Defendant—Direct

Q. You mentioned outside producers. You have heard (2003)

the term independent producer used here several times. Do you have contracts with independent producers? A. Well, they are making pictures independent of our regular line-up of pictures, such as the Walter Wanger pictures and the Skirball pictures, that we call outside producer pictures or independent pictures because we sell them on a separate contract.

Q. Do you have a company called Mayfair or some name like that? A. The Mayfair Company made pictures for us, yes.

Q. In which Jules Levey was interested? A. Yes.

Q. These outside producers have a financial interest in these pictures, have they not? A. That is right.

Q. And they are sold separately from your group of 50? A. That is right.

Q. In this group of 50 how are the pictures generally set up or classified or how are they described? A. There are so many pictures of different stars, so many pictures listed as different titles, such as two Deanna Durban pictures, two or three Abbott and Costello pictures, two or three Montez pictures, two or three DeCarlo pictures, and there are titles listed as to what various pictures that we think we are going to make, and then we have some pictures listed, what we call marquee pictures.

Q. Describe the marquee pictures a little more fully. (2004)

A. We call them marquee pictures and have the titles listed on them because we explain them to the exhibitors as pictures which some one personality is in, that they can put on their marquee to advertise it.

Q. Such as? A. Well, I can't think of any. I can't think of them. Such as the Andrew Sisters or people—

Q. Radio names, bands? A. Radio names or bands.

William A. Scully—By Defendant—Direct

Q. Mr. Scully, in selling or licensing your pictures, you grant the exhibitor the right to publicly perform in his theatre the copyrighted subject that is in the positive print of the picture? A. That's right.

Q. And no right to assign that performing right to anybody else? A. That is right.

Q. And only in the particular theatre or theatres listed in the contract? A. That is right.

Q. You grant him no right to lease or sell or in any way dispose of any part of the tangible property, meaning the print, to anybody else? A. Right.

Q. When the exhibition is finished what must he do with the print? A. Return the print to the exchange.

Q. And in some cases do you direct him to ship it to another exhibitor? A. Some situations do, yes.

Q. In rural situations? A. Yes.

Q. Mr. Scully, did you cause to be prepared a schedule along the same lines that Judge Hand spoke to Mr. Caskey (2005)

about in the 73 situations that were propounded to Universal? A. Yes.

Q. That was prepared under your supervision? A. Yes, sir.

Q. There is no difference, as far as you know, between this and what is contained in the file cabinets that Mr. Wright has here of the records that we previously gave him?

A. No.

Mr. Wright: I just noticed for the first time that there are 73 in the United Artists. I thought you were going to prepare one for the 92, so it would be comparable. The other one covers 92, doesn't it?

Mr. Raftery: Mr. Wright, I have stuck to the papers you gave us and I explained this morning to the Court your 92 counted up 73.

Colloquy

Mr. Wright: I was not referring to what I gave you. I had understood Judge Hand's request applied to the 92 rather than 73, so that you would have a comparable group for each distributor. That is all. I was under the impression that you had furnished us figures for the entire 92 instead of simply the 73.

Mr. Raftery: We answered every question you asked us. I have never seen the other 19. If there is anybody will be good enough to give me the 92 with the other 19 cities, we will be glad to prepare that, but I have never seen the other 19 and I don't know

(2006)

what they are.

Mr. Wright: I think the interrogatory data that was sent you clearly set it forth, but if there is any question, it is the 92 cities of over 100,000 population as of the 1940 census.

Mr. Raftery: I am not going to study the atlas. I have studied everything but it.

You won't tell me what the case is about, so please give me the other 19 cities and I will get them.

Mr. Wright: My impression is that they have already been given you, but if you didn't get them, I will see you get a list naming them.

Mr. Raftery: You neglect two defendants. You gave us only 73.

Mr. Proskauer: Discrimination.

Mr. Raftery: I wish to offer these 73 in evidence and I will be happy to get the others, the 19.

Mr. Wright: We have no objection.

(Marked Defendant Universal's Exhibit U-1.)

Mr. Raftery: Your Honors, the guinea pig picture for Universal is Christmas Holiday, starring Miss Durban.

William A. Scully—By Defendant—Direct

Q. Mr. Scully, in New York City for the past several years, where have you generally licensed the exhibition of your photoplays first-run? I am referring to the Island of Manhattan. A. Criterion and the Rialto.

(2007)

Q. The Criterion Theatre is located where? A. On Broadway between 45th and 44th.

Q. There was a time, Mr. Scully, where Universal pictures were exhibited first-run in the Music Hall, was there not? A. Yes.

Q. Have you been able to get any of yours shown in the Music Hall? A. I think I sold them one picture.

Q. That is one in eight, going on nine years. So you play Criterion? A. Yes.

Q. Do you consider it a satisfactory first-run outlet for your pictures? A. Yes, sir.

Q. Would you prefer to play the Music Hall if you could get a sufficient number of your pictures played there? A. Well, primarily I am interested in getting money for the pictures and sometimes I think I can get more money out of my pictures at the Criterion than I could at the Music Hall.

Q. You get more of your pictures played at the Criterion, do you not? A. That is right.

Q. You get more than 12 weeks playing time a year in the Criterion, don't you? A. Yes.

Q. How many seats are there in the Criterion? A. I think there are some 2000—about 2000.

Q. It is a modern, up-to-date theatre. And no stage shows with your picture there? A. No.

(2008)

Q. Where do you exhibit your pictures generally in Chicago first-run? A. The RKO Palace.

Q. Do you show your pictures in any other first-run theatre in Chicago? A. Yes, we show some of our pictures in the Grand, which is operated by RKO. We have sold some of our pictures, I think, to the Oriental Theatre.

William A. Souly—By Defendant—Direct

Q. But generally, your first-run customer is RKO? A. Yes, sir.

Q. Do you sell any pictures at all first-run to B. & K., Paramount affiliate out there? A. No, sir.

Q. Has this condition, as regards Universal's first-run in Chicago, prevailed for many years? A. Since I have been there.

Q. Philadelphia, who is your first-run account? A. Warner Bros.

Judge Bright: Who operate the Criterion Theatre?

The Witness: The Loew interests.

Q. It is an affiliated theatre? A. Yes.

Q. In fact, every account you have mentioned so far first-run is an affiliated account? A. Yes.

Judge Hand: RKO is, in Chicago?

The Witness: That is affiliated.

Q. Except the Oriental in Chicago? A. The Oriental is an independent theatre.

Q. And the Music Hall is classified as an independent theatre? A. Yes.

(2009)

Q. Now, in Detroit, Michigan, where do you exhibit your pictures first-run? A. At the Fox Theatre, and some we exhibit at the Adams.

Q. Is that also an affiliated theatre? A. The Fox theatre is, yes.

Q. How about the Adams? A. I think the Adams is an independent theatre.

Q. In Los Angeles, California, where do you generally exhibit your first-runs? A. We exhibit some to RKO and some to the Fox West Coast.

William A. Scully - By Defendant - Direct

Q. You divide your product? A. That is right. We sell half to RKO and half to the National Theatres or Fox West Coast.

Q. Well, don't Fanchon & Marco operate a theatre called the Paramount out in that city? A. Yes.

Q. Is there some affiliation with Paramount, if you know, or are they independent? A. I don't know.

Q. Were Universal pictures at one time shown first-run in that theatre? A. Yes.

Q. And since you have been with Universal you have changed your account? A. No, we sold them some of our pictures.

Q. Do you still sell them some? A. No.

Q. When did you stop selling them? A. When we haven't been able to have our pictures played off by Fox (2010)

West Coast and RKO, the time we had sold all of our pictures to RKO, and we had a backlog of pictures sometimes, and we sold some to Fanchon & Marco at the Paramount theatre.

Q. Now, in Cleveland, Ohio, which company is your first-run account? A. RKO.

Q. You have been selling them for many years? A. Yes.

Q. Did you ever sell Loew's in that town? A. No.

Q. When Warners operated there did you sell Warners or did you sell RKO? A. Since I have been with Universal we have always sold RKO.

Q. In Boston, what is your first-run account? A. RKO.

Q. Do you sell Loew's any pictures up there? A. No.

Q. In Pittsburgh, Pennsylvania, what is your first-run account? A. We split our product in Pittsburgh, half to the Shea interests and half to Johnnie Harris.

Q. The Shea interests operate the Fulton Theatre? A. That is right.

William A. Scully—By Defendant—Direct

Q. And Harris operates the Senate and the Harris theatre? A. That is right.

Q. And how do you divide your product, in what proportions? A. Half to each.

Q. To each account? A. To each of the accounts.

Q. I believe the testimony is that of those accounts are independent accounts? A. That is right.

Q. Now on this list, without going into any further great (2011)

detail, since you have joined Universal you have sold first-runs generally to the account mentioned after the name in each city? A. Yes, I would say so.

Q. Are there any situations there where there are divisions of product with other exhibitors, because this is applicable to the one picture, this particular list you are looking at? A. Well, in Los Angeles, as I said, we split our product.

Q. Well, that has been testified to, and also about Pittsburgh. Is there anything below that line where there are divisions of product that do not show on this exhibit? A. In Jersey City we split our product.

Q. With whom? A. Half to Skouras and half to Warner Bros.

Q. And Skouras has been classified here as an independent; is that the way you classify him? A. He is not on here.

Q. No. I say in this lawsuit, the George Skouras circuit has been classified as an independent? A. That is right.

Q. Is that the way you classified him? A. Yes, sir.

Q. You sell the product to him and half to Warners, who operate the Stanley theatre, is that right? A. Yes.

Q. Now, any other situations? A. Worcester, Mass., we split our product half to Warner and half to M & P. (2012)

Q. Do you sell any to Loew's in Worcester? A. No. In Hartford, Connecticut, we split our product, half to Warner and half to an independent, E. M. Loew.

William A. Scully—By Defendant—Direct

Q. At the Majestic theatre? A. That is right. In Los Angeles, California, we split our product half to Fox West Coast and half to Milton Arthur.

Q. Is Arthur an independent? A. Yes. In New Haven, Connecticut, we split half our product to M & P and half to Warner. In Springfield, Massachusetts, we split our product half to Warners and half to Mr. Andes.

Q. That Andes operates the Bijou theatre? A. That is right.

Q. And is he an independent? A. Yes, sir. That is all on here.

Q. Now these splits that you have been telling us about, have you been selling that way for several years? A. Yes, sir.

Q. As long as you have been with Universal? A. Yes.

Q. And the remainder, where you do not split, have you been selling those accounts for the last several years? A. Yes.

Q. Have there been any changes at all in those accounts that appear in the 73 cities we have been discussing? A. Well, there was a change in Los Angeles, where we had sold all our pictures to RKO, and now we sell half to Fox West Coast. (2013)
Coast.

Q. Well outside of Los Angeles? A. I think in Spokane we used to sell our pictures to Fox West Coast, and we sold it to an independent.

Q. And who is the independent? A. McBride. I think his name is. I am quite sure that is it. In Reading, Pennsylvania, we used to sell our pictures to Warner and now we sell them to an independent.

Q. Who is the independent? A. J. Emanuel.

Q. What is his name? A. J. Emanuel. That is about all.

Q. Now, Mr. Scully, you told us you sold your pictures in blocks or groups. Do you have a sales convention each year? A. Yes, sir.

William A. Scully—By Defendant—Direct

Q. When do you usually hold it? A. Between May and July.

Q. Now, before holding that convention do you visit Los Angeles and secure your line-up for the next season? A. Yes.

Q. And do you prepare press material and the other material needed to set up what your program is going to be for the following year? A. Yes.

Q. Where are these conventions usually held? A. Generally held in New York or Los Angeles or Chicago.

(2014)

Q. Do you hold national conventions? A. Sometimes.

Q. Or regional? A. Sometimes we hold regional conventions.

Q. Now, who attend these conventions? A. The sales department in addition to the bookers; and the executives of the home office.

Q. When you say the sales department, does that include all the salesmen, branch managers? A. Salesmen, branch managers, district managers, division managers, and sales managers and bookers.

Q. Now, without going into any great detail, what happens at those meetings? A. There is an explanation of the pictures that we expect to make for the next year, and those that we are going to market for the coming season; and we generally explain each and every picture and give them as much knowledge of the story as we can, plus the personalities we expect to put in the picture; what we anticipate it is going to cost us and what we would like to sell our pictures for. And in addition to that we give them printed matter that they can explain to the exhibitors, who is in the pictures' and whether they are black and white or color, or anything that goes to help make the salesman—or generate a little enthusiasm in the salesmen to sell the merchandise.

Q. Do those meetings break down into smaller meetings? (2015)

A. After the general meeting, there are generally smaller

William A. Souly—By Defendant—Direct

meetings of the district managers with their various branch managers, or managers and salesmen.

Q. And then finally, branch managers with their sales force? A. That is right.

Q. Now, after this regional or national convention—depending on which the O.D.T. would let you have, what happens as regards selling? A. The salesman given the route would call upon various accounts, and they go around and solicit the exhibitors as to the product, and try to sell our product to each and every account that is a possibility; and I guess they do the best they can. Sometimes they are successful on the first call and sometimes it might take two or three different calls to sell an exhibitor. And they do that every day in the week, and they report back to the manager, and the next week they are sent out on a different route, or the same one.

Q. Each salesman has his own specified territory, does he not? A. That is right.

Q. And he has accounts he has to call upon and solicit for license application? A. That is right.

Q. Are these sales persons generally successful in selling all the product they offer to each individual exhibitor?

A. No.

(2016)

Q. By the way when you joined Universal, how many accounts were Universal servicing? A. 7200 or 7300.

Q. And how many are you servicing now? A. Between 11,500 or 12,000.

Q. To go back to these applications that are taken, once a salesman takes an application, what happens to it? A. He submits it to the branch office, and the branch office makes up different forms and with a recommendation sends it to the home office for approval; and the contract is reviewed by the sales manager of the home office, and either approved or rejected, or sent back to the branch, the branch receiving two

William A. Scully—By Defendant—Direct

copies of the contract if it is approved, and retaining one for their files and sending one to the exhibitor.

Q. Are contracts ever rejected by the home office? A. Yes, sir.

Q. Is that a regular practice? A. No, sir.

Q. In short, most that come in are accepted; is that right? A. Yes, sir.

Q. You have no producers' representatives to worry about? A. No, sir.

Q. Now in these contracts that come in generally, is there any selectivity as far as the exhibitor is concerned? A. Yes, quite a lot of exhibitors have selectivity. Most of the ex-
(2017)

hibitors insist upon right of cancellation of a certain group of our product, and the majority, I think ten or twenty per cent, where they buy all of our product, and a lot of exhibitors buy half of our product and some buy a little more.

Q. Is there any different norm as regards selectivity in relation to the affiliate and the independent? A. I don't understand what you said.

Q. Are there any different rules applied as regards the granting of selectivity to an independent or the affiliated theatres? A. No, sir.

Q. Do the independent exhibitors demand and receive the right of selectivity in your contracts? A. Yes, sir.

Q. Is it the infrequent thing or the rule as far as independents are concerned? A. Generally the rule.

Q. Does the same apply to the affiliated? A. Yes, sir.

Q. Do you see any great difference between any exhibitor in the demands he exacts of the distributor? A. I do not see any difference in those he wants from me.

Q. And gets from you? A. That is right.

Q. As matter of fact, Mr. Scully, the exhibitor is trying to buy as much of your product as he possibly can with as little obligation as possible to play it; isn't that the ex-

William A. Scully—By Defendant—Direct

hibitor's desire? A. I would say that he buys our product as few as he can, so that he can have a greater selectivity of our pictures and play all the good pictures.
(2018)

Q. And he likes to pay you as low a license fee as he possibly can get away with; isn't that the fact? A. All exhibitors are like that.

Q. Now, have you had any resistance from exhibitors on selling a large group rather than selling a split-up number of small groups? A. No.

Q. What have you to tell this court about the general reaction of exhibitors to that method of selling? A. Well, the exhibitors like to be assured of a constant flow of pictures. Sometimes they cannot get all of the good pictures or buy all of the good pictures, and they like to buy as many pictures as they can, so if sometimes they didn't have a good picture they might play one that is not so good, and they generally like to buy as many as they can, and they generally contract for all your pictures, with the right to select what they think they can absolutely use.

Q. Well, have you had—

Judge Hand: What does that mean, that they want an option on the whole thing?

The Witness: That is right.

Judge Hand: And not to be compelled to take anything they don't want?

The Witness: They make as minimum a commitment for the pictures as they possibly can negotiate,
(2019)

with the understanding that they will use say half of your product or sixty per cent of your product; but they always have the opportunity of using them if they need them.

Judge Bright: Does your license agreement provide for such selectivity?

William A. Scully—By Defendant—Direct

The Witness: We provide for it in the negotiation when we enter into the contract when the exhibitor wants to buy so many pictures—

Judge Bright: Is it in your contract?

The Witness: Selectivity?

Judge Bright: Yes.

The Witness: No. We give the man the right to cancel a certain percentage of the product.

Judge Bright: That achieves the same result, doesn't it?

The Witness: Yes.

Q. Mr. Scully, you mean it is not in the printed form, but selectivity may be typewritten in or written in in pen and ink by the salesman? A. That is right, when he is negotiating the deal.

Q. And each separate contract tells the extent of the selectivity the exhibitor has been able to bargain for, isn't that right? A. Right.

(2020)

Q. Now, as your product has improved in quality have you been able to better your position on selectivity? A. To some extent.

Q. To any appreciable extent? A. No, I would not say that.

Q. So notwithstanding the improvement in quality of Universal pictures, you still have the same demands for selectivity from all exhibitors, is that right? A. That is right.

Q. Now, in connection with 17,000 theatres—I think somebody has said—

Mr. Proskauer: Eighteen.

Mr. Raftery: Well, it has gone up to eighteen since I last looked.

Mr. Davis: It is still going up.

William A. Scully—By Defendant—Direct

Q. Evidently there has been an increase in the number of theatres in this country during the period from 1936-37 up to 1944-45; and by "theatres" I mean motion picture theatres; isn't that right? A. There would appear to be, yes.

Q. Well, in a city like New York theatres that were formerly legitimate theatres are now motion picture theatres?

A. Right.

Q. Such as the Winter Garden? A. Yes.

Q. The Gaiety? A. Yes.

Q. And others, isn't that right? A. Yes; and the Globe. (2021)

Q. Have there been many new theatres built since the beginning of the war? A. I don't think so.

Q. Whereby restrictions prevented the building of more theatres? A. Yes.

Q. But a great number of theatres are now opened that were closed prior to the period of prosperity we now have?

A. Right.

Q. And of these theatres how many of the 17 thousand or 18 thousand theatres would you say are of a class, one theatre in one town or one theatre in the one neighborhood of a larger subdivision? A. I don't understand you.

Q. Well, let us take it this way: How many first-run theatres do you think there are in this country, important first-runs, in cities of 10,000 or over? I think the Government says there were four hundred and something in cities of 25,000 or over? A. Probably 2500.

Q. In other words, numerically a great many of these theatres are located in situations or towns where it is one theatre in the situation; isn't that the fact? A. Right.

Q. And that exhibitor in that situation has a call on the product of all these defendants and everybody else that exhibits pictures; isn't that the fact? A. Yes.

Q. Now, in those situations generally, how do you fare on selectivity or even getting into them? A. We sell less

William A. Scully—By Defendant—Direct

pictures, of course, in those situations; and in a number of (2022).

situations we do not even obtain representation.

Q. Are there any important situations in this country where you can't even get in that you can recall now? A. No.

Q. How about Mr. Sudekum? Have you been able to license your product to that circuit this year? A. No, sir.

Q. Last year? A. No, sir.

Q. The year before? A. No.

Q. How long has Sudekum left you out? A. I think about four years.

Q. Sudekum is classified as an independent in this case, is he not? A. Yes.

Mr. Raftery: I think the Government concedes that. Is that right?

Mr. Wright: Mr. Sudekum is what I would call a quasi-independent.

Mr. Proskauer: Wait a minute, let us not pass that with a jest. Mr. Sudekum is not connected with any of the five so-called major defendants.

Mr. Wright: He does operate the Paramount Theatre in Nashville on a profit-sharing basis with Paramount.

Mr. Proskauer: Well, that is one exception you can make.

(2023)

Mr. Seymour: Mr. Wright, so we won't have any matter on the record which we will have to correct later, I am told that the theatre which you refer to is merely leased to Mr. Sudekum. Is there any dispute about that?

Mr. Wright: As I understand it he leases it under an arrangement whereby he agrees to play Paramount pictures and he also gives Paramount a share in the profits of the operation generally.

William A. Scully—By Defendant—Direct

Mr. Seymour: I assume that he pays rent for the theatre that he leases, yes.

By Mr. Raftery:

Q. And Mr. Sudekum operates a great many theatres down in Tennessee and the environs, doesn't he? A. Yes.

Q. And he has shown a single Universal picture in a great many years, has he? A. I think about four.

Q. I believe there is a man named Richards in New Orleans. A. Yes.

Q. And do you sell Mr. Richards any pictures? A. No.

Q. How many theatres does he operate? A. Oh, I think somewhere around 80 or 100.

Q. What is the name of his company? A. It was the Saenger Amusement Company, as far as I know.

Mr. Raftery: Well, to keep the record straight Mr. Seymour,——

Mr. Seymour: Publix-Saenger is the corporation (2024)

in which Paramount has some interest—oh, I beg your pardon. Paramount-Richards.

Mr. Raftery: Paramount-Richards?

Mr. Seymour: Yes.

Mr. Raftery: And is part of that operation down there affiliated or not?

Mr. Seymour: The Paramount-Richards Company is one in which Paramount has a 50 per cent interest. Mr. Richards himself also, as I understand it, operates some theatres in which Paramount has no interest.

Mr. Raftery: And that, I believe, is called United something or other?

Mr. Seymour: There are two companies, as I understand it, the United Theatres and Theatres Service in which Mr. Richards is interested but in which Paramount has no interest.

*William A. Scully—By Defendant—Direct**By Mr. Raftery:*

Q. Well, at any rate, in the theatres that Richards operates down in that New Orleans area, have you been able to sell him any Universal pictures for the past several years?

A. Not for seven years.

Q. How long? A. Seven.

Q. And any representation you get down there you have to get from other sources? A. Yes.

Q. Are there any other situations that you can think (2025)

of now, where you have been left out; and by "you" I mean Universal? A. Well, we were left out of the Schine Circuit, I think, we did not sell for one year. There was the Skouras Theatres in New York which we did not sell for one year; the Century Circuit in New York which we did not sell for one year.

Q. We have heard about the Schine and the Skouras. What is the Century Circuit in New York? A. That is a circuit run by A. H. Schwartz in Long Island.

Q. And where are their theatres located? A. In Long Island and Brooklyn.

Q. Are they representative theatres? A. Yes.

Q. Large theatres? A. Yes.

Q. And their circuit extends quite a bit out in Long Island, does it not? A. Yes.

Q. Do you know how many theatres they operate? A. Oh, I would say about 50.

Q. And have you had a run available for them for all those theatres of all your pictures? A. Yes.

Q. And they did not buy any? A. That is right.

Mr. Raftery: I have pretty well exhausted this particular point as far as this man is concerned.

Judge Hand: We will adjourn until 10:30 tomorrow morning.

(Adjourned to November 2, 1945, at 10:30 a.m.)

William A. Scully—By Defendant—Direct

(2026)

New York, November 2, 1945,
10.30 o'clock a.m.

Trial resumed.

WILLIAM A. SCULLY, resumed the stand.

Direct Examination Continued by Mr. Raftery:

Q. Mr. Scully, when we adjourned last night we were talking about situations where Universal had been left out by exhibitors. Have you any other situation that you wish to call to the Court's attention? By the way, what is that paper you are looking at? A. List of our exchanges.

Q. Just the names of the cities? A. Yes. There is the S. & S. Circuit in Chicago.

Q. How long were you left out of the S. & S.? A. Three years.

Q. Is that a small circuit or a large circuit? A. They have about 80 to 90 theatres.

Q. No Universal pictures were exhibited in any of those theatres during that three-year period? A. No, sir.

Judge Bright: What was the reason for that?

The Witness: We could not negotiate a proper deal with the circuit.

(2027)

Judge Bright: Was there some fight on or something?

The Witness: No, just a question of trying to obtain the terms that we thought we were entitled to and we could not consummate the proper deal.

Q. Was there anything extraordinary in the demands that you were asking for your product? A. No.

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Q. Any other circuits there or individuals? A. Cooperative Theatres in Detroit, Michigan, that we did not sell our pictures to for a year.

Q. The Cooperative in Detroit, is that a buying combine?
A. Yes, sir.

Q. How long has that been in existence? A. I think, to my knowledge, 10 or 15 years.

Q. And what is the nature of the combine? A. They have a gentleman buying pictures for various theatres in Detroit, City of Detroit and outlying territories.

Q. How many theatres? A. Oh, probably a hundred.

Q. Hasn't there been a time in the history of that combine where the individuals who were buying had no interest of any kind of character in the theatres they were buying for?
A. Yes.

Q. Haven't there been times when they have refused to pay you, grant you, any percentage terms for any of your pictures? A. Yes, sir.

(2028)

Q. And insisted on paying a flat rental only? A. Yes, sir.

Mr. Raftery: I would like a concession from Mr. Wright that the Government has never at any time taken any steps against that combine or any buying combine.

Mr. Wright: Up to the last three words there, you were all right. We haven't taken any steps against Cooperative. We regard the present suit as directed against the very largest buying combines in the industry.

Mr. Raftery: I would like—

Mr. Proskauer: Any other than this one, this alleged one.

Mr. Raftery: I would like a concession from Mr. Wright that he has never taken any steps against any

William A. Scully—By Defendant—Direct

combine similar to Cooperative that exists in the United States, leaving out the five buying defendants here.

Mr. Wright: Well, I would say that the Schine, Crescent and Griffiths circuits all represent buying combines and in an intensified form.

Judge Hand: Why waste time on it, trying to get a stipulation like that out of him? Nobody would make that stipulation in his position.

Mr. Raftery: It is a very simple stipulation.

Judge Hand: All right, he wouldn't make it. It may be simple.

(2029)

Q. Are there other buying combines in this country besides Cooperative, similar to Cooperative? A. Yes; there is a Cooperative circuit in Pittsburgh; there is the Affiliated Theatres in Boston; there is the Allied, I think it is, Allied Theatre Company in Chicago.

Q. Mr. Scully, continue with the exhibitors or combines who have left you out.

Judge Bright: When you say "left out", you mean who refused to buy from Universal?

Mr. Raftery: That is right, although the product is available.

Judge Bright: Are these independent buyers?

Mr. Raftery: Yes, sir.

Judge Bright: Not affiliated?

Mr. Raftery: No, sir. The only affiliate we mentioned yesterday was Richards.

Judge Bright: What is your point in this proof?

Mr. Raftery: The point is that this is an exhibitor's market; they can buy or not buy from distributors as they see fit; that the product is available, and that it really is the fact that there is nothing that they can

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complain of about any of the distributor defendants in the case, and I am confining it, when I say that, to the two that I represent. We have product and they won't buy it.

(2030)

Mr. Proskauer: May I suggest to your Honor in answer to your question that there is another aspect of this that we deem important. The only way we have of legitimately protecting ourselves against these buying combines is that, if we have our own theatres and they gang up on us, to use a conventional phrase, we can put the shows in our own theatres.

Mr. Raftery: I have only one or two more that I want to refer to.

Judge Bright: I am not trying to shorten the examination.

(2031)

Q. Is there any other one that you see there—not on your list, but if your memory is refreshed by looking at your exchange territory? A. Is there any other what?

Q. Independent situation where you have been left out by the exhibitor? A. Yes, at Fall River, Massachusetts.

Q. Who is the exhibitor in Fall River, Massachusetts, first-run? A. Mr. Yamins.

Q. What theatres does he operate in Fall River? A. He operates the Durfee, Capital, the Plaza and the Strand, and there are two other first-run theatres; I can't recollect the names of them. The Plaza and the Strand are two subsequent run theatres.

Q. Well, does he operate all the first-run theatres or did he operate all the first-run theatres in Fall River, Massachusetts, up till recently? A. No, there was one theatre that was in opposition there, called the Academy.

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Q. What happened to the Academy? A. Mr. Yamins I think bought the lease on the theatre and closed the theatre.

Q. Well, after that he operated all the first runs? A. Yes, sir.

Q. Now, how many years did he leave you out of Fall River? A. Two.

Q. Now, have you been able to sell him the product up to this time? A. No.

(2032)

Q. What did you do? A. I tried to promote someone to take over the Academy theatre, and I was successful in having a man—I think he bought the building of the Academy Theatre—and when the lease runs out, Mr. Yamins' lease runs out, I think he will operate the Academy theatre.

Q. Now, whom did you promote to take the Academy theatre? A. Mr. Zeitz.

Q. Is he an independent exhibitor in Massachusetts? A. Yes, sir.

Q. Where does he operate? A. In Portland, Maine, and New Bedford, Massachusetts.

Q. Has he gotten possession of the theatre yet? A. No.

Q. Do you know when he is going to get possession? A. I think it is some time this August.

Q. Next August? A. Yes, next August.

Q. So up until next August you have no deal and have had no deal in the past two years in Fall River? A. No. I have sold my pictures in Fall River at the present time to Mr. Zeitz when he opens the Academy theatre.

Q. For exhibition next August? A. That is right.

Q. Universal has no interest in Zeitz, in the theatre property? A. No.

Q. Now when you had your trouble with Richards down South, what did you do? A. I tried to sell as many theatres

(2033)

as I could, and in some situations I was successful in selling

William A. Scully—By Defendant—Direct

second-run theatres pictures to play first-run. And where there was any opportunity of selling a first-run theatre pictures, I sold them our pictures.

Q. And you are still playing your pictures in those converted second-runs and third-runs and first-runs in that area?

A. Yes, sir.

Q. Do you sell franchises, Mr. Scully? A. Yes, sir.

Q. I ask you to look first at the New Orleans sheet. Did you sell franchises generally in the New Orleans area to every theatre that you sold your first-runs to in opposition to Richards? A. I believe we did.

Q. Now will you tell the Court the reasons for selling the franchises to those theatres? A. The exhibitor in converting his theatre from second-run to first-run, wanted to be assured of product and wanted a steady flow of first-run product, and generally insisted that we sell him a two or three-year deal; and as we thought that that would be the best way to market our pictures to obtain revenue out of New Orleans territory, we sold him a two and three year deal for our pictures.

Q. Now, did these exhibitors expend moneys in improving their theatres to convert them from second or sub-runs to first-runs, as a general rule? A. I think so. Some exhibitors that had only one theatre were fortunate enough to convert (2034)

something else into another theatre at certain times.

Q. Well, generally speaking, the Richards houses were superior to the houses that were down there when you got into your difficulty? A. That is right.

Q. And these houses were converted? A. Yes.

Q. And you sold them two and three-year deals to protect them on their new investment? A. That is right.

Q. How many franchises would you say you have made with independent exhibitors during the period you have been at Universal? A. Probably five hundred.

William A. Scully—By Defendant—Direct

Q. How many of them are in effect today? A. I think they are all in effect.

Q. Now, do these documents contain a list of every franchise, as far as you know, that Universal has with both independent and affiliated exhibitors? A. Well, they are franchises in two and three-year deals.

Q. Now, in addition to the list you had in your hands, the remaining list contains the rest of the United States, does it not, by exchanges? A. I think so.

Q. That list was compiled under your direction? A. Yes, sir.

Mr. Raftery: I am going to offer it.

Judge Bright: This is just a list of franchises?

Mr. Raftery: It does more than that, your Honor.

(2035)

It has the town and State; the theatre and circuit, signed by the name of the exhibitor; the date of the franchise; the length of the franchise; the starting year and the finishing year.

Mr. Wright: We have no objection. We would like a copy.

Mr. Raftery: Yes. I will give you the one I am using, Mr. Wright.

(Marked Defendant Universal's Exhibit U-2.)

Mr. Raftery: In addition the exhibit shows, if it is more than one theatre, it will say 8 situations or 18 situations, or how many theatres are covered by the document.

Q. Mr. Scully, I show you three sets of contract forms for two-year deals for Universal product for the year commencing 1942-43, and 1943-44, 1944-45, 1945-46, and 1946-47. Are these the forms used by your company on these two-year deals? A. Yes.

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Mr. Raftery: I offer those, and by tearing them apart you can get a copy.

Mr. Wright: Thank you. We have no objection.

Judge Hand: What is this to show?

Mr. Raftery: Manner and method of selling the product.

Judge Hand: What?

(2036)

Mr. Raftery: It shows the manner and method of selling the Universal product.

(Marked Defendant Universal's Exhibits U-3-A, U-3-B and U-3-C in evidence.)

Q. Now this form of contract in this type of field is offered to affiliated exhibitors and independent exhibitors alike? A. Right.

Q. On your three-year deals that are included in that schedule, do you offer those to the affiliated and independent alike? A. Yes.

Q. Now, what type of exhibitor has availed himself more of the opportunity of buying your long-termed deals, the independent or the affiliated, numerically? A. Independent.

Q. In a much greater degree or— A. Well, it would be, because naturally there are more independents than there are affiliates.

Q. In selling all exhibitors, whether you sell them a one-year deal or a partial deal, or any kind of a deal, do you discriminate in any way as between the affiliated and the independent? A. No.

Q. Your product is open for all? A. Yes, sir.

Mr. Raftery: You will concede that Mr. Scully will give the same answer to the Zukor question?

Mr. Wright: Yes, indeed.

William A. Scully—By Defendant—Cross

(2037)

Mr. Raftery: Are there any questions here?

Mr. Seymour: Yes.

Cross Examination by Mr. Seymour:

Q. Mr. Scully, does Universal license its pictures for exhibition in some of the theatres operated by the theatre operating companies in which Paramount is interested? A. Yes, sir.

Q. Do you know where those negotiations for those film licenses are conducted? A. In the various offices of the fellows running the theatres.

Q. That is, in the field at the office of those theatre operating companies? A. Yes, sir.

Mr. Seymour: That is all.

Cross Examination by Mr. Davis:

Q. Mr. Scully, does Universal license films to Loew's first-run theatres in New York City? A. The Criterion theatre.

Q. The Criterion only? A. We have played some pictures in the Capitol theatre.

Q. What? A. We have played pictures in the Capitol theatre.

Q. But you regularly license to the Criterion, do you? A. Yes, sir.

Q. How many films a season? A. We don't have any number. They play all our good pictures.

(2038)

Q. Do you license them in groups or individually? A. We have an agreement with the Loew people that they play all our good pictures in the Criterion Theatre and, as the pictures come out, they play them.

William A. Scully—By Defendant—Cross.

Q. What clearance do you give to the Loew's Criterion over the next run? A. They have seven days clearance over greater New York and Long Island and New Jersey.

Q. Seven days? A. Yes, sir.

Q. Is the length of the clearance in your contracts with the Criterion dependent on the admission prices charged by the next run? A. No, sir.

Q. It is a flat clearance of seven days? A. Yes, sir.

Judge Hand: Mr. Wright?

Cross Examination by Mr. Wright:

Q. Mr. Scully, with reference to these license agreements that have been just offered here, there is in evidence, I believe, an agreement for the 1943-44 seasons previously supplied by your company. Now, as I understand it, it is your testimony that your regular method of selling films that season was on this two-year form, marked in evidence as U-3-A, covering the 1942-43 and 1943-44 seasons rather than on a form providing for the single season? A. No.

Q. You mean that when you do make a two-year deal as distinguished from a one-year, this is the form you generally use, is that right? A. Yes, sir.

Q. Do you know whether there are any differences in the printed provisions here and those you use in the one-year form? A. When we make a two-year deal with an exhibitor, we use the contract of the current season's product, and when we make the additional year, we make it on that form.

Q. The difference between this form U-3-A and this Exhibit 290, which is in evidence as the 1943-44 form of yours, is simply that your U-3-A covers two seasons product and the 290 just covers one; otherwise is there any difference of substance in the provisions, do you know? A. This contract covers one-year product for the season of 1943-44.

William A. Scully—By Defendant—Cross

Q. I say, other than the difference in season covered, can you tell us offhand whether there is any difference in the contents of the forms? That is what I am getting at. A. The only difference in the contents of the form, I don't think this has any printed matter on the back and this has.

Q. Then when you make—

Mr. Raftery: Mr. Wright, I think we can save a lot of time if you will just read the first paragraph.

Mr. Wright: I haven't seen the form.

Mr. Raftery: I did not, until five minutes ago.

(2040)

Q. Mr. Raftery calls my attention to the fact that these agreements for two years, that you refer to, are actually used as supplementary forms, that is, the exhibitor signs the agreement on a form such as 290 there, which has the printed provisions on the back, and then also executes one of these two-year forms, is that right? A. Yes.

Q. Did I understand you to say that you made your films available to all exhibitors without discrimination? A. I make my product available to a run to an exhibitor.

Q. Do you want the Court to believe that you make your product available to all exhibitors playing the same run on the same terms? A. No.

Q. In so far as the rental terms you make in your agreements are concerned, you vary them greatly, do you not?

A. Right.

Q. That is, from every exhibitor you do business with on any run you try to get the highest terms that you can get out of him and the most film rental regardless of what terms you are selling his competitor on, isn't that right? A. Yes, sir.

Q. And you are frequently successful, are you not—

A. Sometimes.

William A. Scully—By Defendant—Cross

Q. —in—just let me finish the question. A. Pardon me.
(2041)

Q. —in securing much higher terms and film rentals from independent exhibitors on a particular run than you do from the affiliated theatres which may be playing in opposition on the same run, isn't that right? A. I wouldn't say so, no.

Q. Would you say you had not? A. I don't think the independent exhibitors pay us any more for the same run than an affiliate does or would.

Q. You don't think so. Well now, do you know? A. No, I don't know, unless you are talking about something specific.

Q. Let us talk about something specific. A. All right.

Q. I call your attention to the interrogatory answers furnished by your company with reference to Philadelphia. You see the Model Theatre there, exhibitor, Warner Bros., which—

Mr. Rattery: We cannot even hear the name of the theatre.

Mr. Wright: The Model.

Q. —Warner Bros. played a fourth-run in Philadelphia on Christmas Holiday at a rental of \$137.50, is that right?
A. Yes, sir.

Q. That run began on September 19th or September 17th and then concluded on the 18th, right? A. That is right.

Q. Then I show you this fourth-run in the Ambassador of William Greenfield. A. Where is the run?

(2042)

Q. The run is up at the top. A. Oh.

Q. Paid you \$321.91 for a run that began on the same day, September 17th, and continued through September 20th, right? A. Yes.

William A. Scully—By Defendant—Cross

Q. And then there is a fourth run in the Oxford Theatre, Warner Bros. house, played September 19 and 20, film rental was \$183.69, is that right? A. Yes, sir.

Q. Then you played a fourth run in the New Colonial from September 20 to September 23 inclusive and he paid you a film rental of \$550.41, didn't he? A. Yes.

Q. Then you played a fourth run in the Warner Bros. Sedgewick Theatre, September 21 through September 23, and they paid you a rental of \$100, did they not? A. (No answer.)

Q. And you also played a fourth run in the Liberty Theatre of Warner Bros., September 22 and 23, a film rental of \$137.50, isn't that right? A. Can I see it a minute?

Q. Yes.

Mr. Raftery: Are those flat rentals, Mr. Wright?

Mr. Wright: It is a little difficult to say.

Q. Can you tell from looking at the rentals there whether they are flat or percentage? A. Yes.

Q. Which are flat and which were based on percentage? (2043)

A. Here is the Colonial Theatre. I would assume it is a percentage. Here is the Oxford Theatre. I would assume is percentage. Here is the Ambassador Theatre. I believe is percentage. And I think the other three are flat rental.

Q. In other words, you sold the Warner houses on a flat rental and you got percentage out of the independents, is that right, in that situation? A. No, we sold Warner on percentage too.

Q. On the fourth-run? Which was the fourth-run Warner, which was on percentage? A. The Oxford Theatre. I don't know whether it is on percentage or not. From the rental returns of \$183.69, it would lead me to believe it was on percentage. I am not positive.

Q. Other than the Oxford, the other runs that were flat rental are the Warner runs, isn't that right? A. That is right.

William A. Scully—By Defendant—Cross

Q. As a matter of fact, when it comes to percentage terms you actually get, in many situations, a higher percentage for the same pictures which independents play on a subsequent-run in the same area than what you get from an affiliated exhibitor playing the pictures first-run in the area, isn't that right? A. What area?

Q. Well, let us take—

(Discussion between Mr. Raftery and Mr.

(2044)

Wright out of the hearing of the Court.)

Mr. Wright: Yes.

Mr. Raftery: I just wanted to make sure that all this stuff is in because I have no idea what went in in the wholesale offer in the early part of the case.

Mr. Wright: I would like to ask to have this marked for identification.

(Marked Government's Exhibit 384 for identification.)

Judge Goddard: Mr. Scully, does the seating capacity of a theatre enter into the amount of percentage?

The Witness: No.

Judge Goddard: In fixing the percentage?

The Witness: Does not enter into the amount of percentage. Seating capacity has a great deal to do with what film rental you are going to obtain because you have more seats with more people in it.

Q. I will call your attention to an agreement that is in evidence here as Exhibit 259, a memorandum of a three-year deal with Warner in Philadelphia, covering the 1941-42, 1942-43 and 1943-44 seasons. The terms stated there generally provide five pictures at 35 per cent, 2½ per cent off for double bill; 5 at 30 per cent, 2½ off for double bill, 5 at 25

William A. Scully—By Defendant—Cross

per cent, 5 per cent off for double bill; balance commitment 20 per cent; if double bill, 15 per cent or flat rental; then the (2045)

following terms to be negotiated and agreed upon between Mr. William A. Scully and our zone managers. That means between you and the Warner theatre managers in the various zones in which they operate? A. Yes.

Q. Now then, there is also a deal sheet attached here, is there not, signed by you and—can you read that signature?

A. Mr. Hinchey.

Q. He is the manager in the Philadelphia zone? A. No, he was a film buyer.

Q. Film buyer for Warner? A. In the Philadelphia zone.

Q. Dated December 1, in which you then fixed the precise rentals for the first-run theatres in Philadelphia, is that right? A. Right.

Q. There you provide for five pictures to be played in the theatres listed there as the Warner first-run houses at rentals varying from 20 to 35 per cent, depending upon what they gross, is that right? A. That is right.

Q. As those were your first five top pictures, in the first bracket; those were the choice pictures of your season's release? A. Yes, sir.

Q. In selling those top pictures to the independents who played the second-run— A. Just a minute.

Q. —or played subsequent-run—there are no independent second-runs in Philadelphia, or there weren't at that (2046)

time? A. I think there is an independent second-run in Philadelphia.

Q. When you get down to wherever there were independents and you offered those top pictures to those independents, did you offer them any of your top pictures at 20 per cent of the gross? A. 20 per cent? No.

Q. Yes. A. No.

William A. Scully—By Defendant—Cross

Q. You tried to get and, in most cases you did get, from 35 to 40 per cent of the gross, isn't that right? A. Subsequent-run exhibition?

Q. Yes. A. If I was, I was awfully lucky.

Q. On your top pictures. A. I don't think we got 40 per cent of the gross for subsequent-run theatres in Philadelphia.

Q. 35? A. Yes, might be.

Q. In any event, it was a higher percentage than what you were getting in some instances on your top pictures first-run, isn't that right? A. No, because I had an opportunity of earning 35 per cent for my pictures in first-run Philadelphia.

Q. I understood you had the opportunity. I say, the percentage that you got there varied from 20 per cent up to, what is it, 35, depending on what the picture did, isn't that right? A. That is right.

Q. In selling those subsequent-runs, is there any case (2047)

where you made a deal with a subsequent-run independent in Philadelphia where under any circumstances he would get that same top picture that you sold to Warner Bros. first-run for a rental, a film rental of 20 per cent? A. I might have sold it to him on a flat rental basis where he would get the film rental at 20 per cent.

Q. I am talking about the contract terms now. A. You mean on a percentage basis?

Q. Where you sold it on a flat rental basis, you would not know what percentage of his gross you got? A. Right.

Q. But I am referring where you sell on a percentage—where you sold on a percentage basis, where he agreed to pay you a percentage of his gross. A. Would we sell it for 20 per cent?

Q. I am asking you if you can point to any deal you actually made with an independent subsequent-run in Philadel-

William A. Scully—By Defendant—Cross

phia where your contract said that he could have the picture or he would pay 20 per cent of the gross of the picture under any circumstances set forth in the contract. A. No.

Q. You referred to the so-called buying combinations— or, before you get to that, let us take this situation of Richards down there in New Orleans. Of course, the majority (2048)

of those theatres that Richards buys for are those in which Paramount doesn't have an interest; do you know that? A. Yes.

Judge Bright: "Doesn't", did you say?

Mr. Wright: Yes.

Q. That is, he himself operates as a buyer for a very large number of theatres in which he has varying interests himself, isn't that right? A. That I don't know.

Q. Well, he buys for 90 or 100 theatres down there, isn't that right? A. Yes.

Q. Or more than that. Then you say when you broke with Richards you broke with him for all the theatres he bought for, isn't that right? A. That's right.

Q. And then you say you were able to encourage some independent opposition. You did that by giving them franchises, is that right? A. Yes.

Q. And, as a matter of fact, you had to give them franchises, did you not, because they knew that if they did not have the franchise, any time you and Richards got back together again, they would lose the product you had given them without any opportunity for continuing the run at all?

Mr. Seymour: I object to what they knew. I think it is plainly incompetent.

Judge Hand: Overruled.

A. I don't understand what you said.

William A. Scully—By Defendant Cross

(2048a)

Q. It is a fact, isn't it, that in those cases the exhibitors were the ones who insisted on the term deal, that is, the term deals that you made, isn't that right? A. They insisted upon it, yes.

(2049)

Q. And the reason that they insisted upon it was that they knew, did they not, that no matter how much film rental they were paying you in a particular situation, that if you and Richards got together again over Richards circuit, you would take those pictures away from them without their being given any opportunity to negotiate for a continuance of the run, isn't that right?

Mr. Seymour: If your Honor please, that is certainly argumentative.

Judge Hand: It is improper in form. I do not know that it makes any difference—

The Witness: Shall I answer the question?

Judge Hand: Instead of saying "they knew" it might be framed to read "it would be possible for them to do so and so."

Mr. Wright: Let me put it this way:

Q. You knew, as a matter of fact, that if you had not committed yourself in those situations under a deal and Richards offered you for the Circuit more money than these particular independents as a group was paying, you would have taken the pictures away from them and given them back to Richards regardless of whether in any individual situation the independent was paying you better terms than Richards had or would or not, isn't that right? A. No, sir.

Q. Now, these buying groups that you spoke of, composed of independent exhibitors—have you any idea why

(2050)

William A. Scully—By Defendant—Cross

those groups were formed? A. To buy pictures easier and cheaper, I think.

Q. Precisely. And in each of those areas where those so-called buying combines operate there is, is there not, a very large affiliated circuit which in terms of buying power considerably exceeds any of the so-called independent buying combines; isn't that right?

Mr. Seymour: If your Honor please, I object to that as argumentative and incompetent. He has got a lot of conclusions in the question. He is just arguing his case.

Judge Hand: Of course, really all of this is argumentative.

Mr. Seymour: Well, it seems to me that had better be spelled out in a brief rather than in a question.

Judge Hand: It is not factual. You are making just arguments now and putting them in the form of questions. Lawyers often do that. And he refuses to answer very often in your favor.

Mr. Wright: I agree that it is argument, and the only reason that I went into it was that I felt that his direct examination was pure argument, and was permitted; and I thought we might hear some of the arguments of the other side; but it can well be de-

(2051)

ferred until after the witness is off the stand.

That is all.

Mr. Raftery: Just a few questions.

All of this is in evidence; we will save it for the brief, and we will try to find out whether the houses are percentage and what the contracts were, and so forth, and argue on the brief. However—

Judge Hand: Yes. Do not have such minutiae that nobody can understand it except a research man in a very limited field.

William A. Scully—By Defendant—Redirect

Mr. Raftery: We will accept a limit on the length of the brief.

Redirect Examination by Mr. Raftery:

Q. Mr. Scully, his Honor, Judge Goddard, asked you about the size of the theatre affecting the amount of percentage that you can get in a given situation. Can you get as high a percentage of the gross receipts from a theatre like the Music Hall, with a seating capacity of 6200, as you can in a theatre like the Criterion? A. If the picture earns it, yes.

Q. Well, that would come in the overage, wouldn't it, rather than in the initial percentage? A. That is right.

Q. In other words, the larger the theatre the lower the percentage starts, but your ability to earn comes from the (2052)

overage figure if your picture earns it? A. Right.

Q. Now, Mr. Wright tried to compare first-run exhibition terms with second-run exhibition terms. In your percentage deals over this period of years, what has been the number of pictures that you have been able to get percentage from exhibitors, generally, selling in the field? A. On an average, about ten.

Q. About ten pictures? A. Yes.

Q. Now, in the sliding scale percentage that appears here, where the amount of your earning depends on what the picture does in the box office, do you usually sell pictures in the second-run on sliding scale? A. Yes.

Q. Did you have any sliding scale deals at that time with other exhibitors, independent and affiliated in the subsequent-run? A. Yes.

Q. That is a common form of deal in the industry generally, is it not? A. Yes.

Q. In these theatres that are included on that list that Judge Proskauer has in his left hand, is there anything to indicate whether those theatres are directly competitive, that Mr. Wright asked you about? A. No.

William A. Scully—By Defendant—Redirect

Q. Is there anything to indicate the seating capacity or the ability to pay? A. I don't know. Let me see it, will you, Judge?

(List handed to the witness.)

(2053)

Q. These are merely answers to interrogatories where we are asked to tell the film rental we got in given situations; that is all. A. No, but it says in here that these theatres are fourth-run, and they are all marked fourth-run; but I see the Ambassador here, although it is marked fourth-run, it played on September 17th to 20th; and the Warner Liberty Theatre marked fourth-run played on September 22nd and 23rd. Now, it might have been fourth-run in a certain section or it might have been fourth-run in the City of Philadelphia. Now, one of these theatres might be at one end of the town and the other might be at the other, I don't know.

Q. And you have different numbers of playing days? A. That is right.

Q. Now, is there any way that you can compare film rentals from those documents as to whether one was fair film rental or an unfair film rental, or an adequate film rental? A. No.

Judge Bright: Well, he called your attention to the fact that you were charging 35 per cent on fourth-runs in those several instances as compared to 20 per cent on first-runs in the same city. Can you explain why that is so?

The Witness: Well, the 20 per cent on first-run in a city like Philadelphia is the starting point; if a

(2054)

picture grosses a certain amount of money we obtain 20 per cent; if it grosses a certain amount more, we get 25, 27½, 32½, or 35 per cent. When a picture grosses a certain amount of money in a theatre we get 35 per cent of the gross receipts. And when Mr.

William A. Scully—By Defendant—Redirect

Wright says that we are selling pictures at 35 per cent in subsequent-run, probably we are, I don't know, in Philadelphia. And when he asked me whether we sell pictures at 20 per cent to subsequent-runs in Philadelphia, I answered him no.

Judge Bright: Why did you charge more for fourth-runs than you did for first-runs? That I think was what his inquiry was directed to.

The Witness: We don't charge the fourth-run more. We have an opportunity of earning 35 per cent of the gross receipts in the first-run. It is a question of how much the picture takes in at the box office. If the picture is a quality picture and can gross at the box office, we get ourselves 35 per cent. If the picture is not quality and the people do not like it, and it does not take in any money, we obtain 20 per cent of the gross receipts, or 25, or 27½, or whatever it is.

Judge Hand: To what extent in Philadelphia do you sell first-run pictures to independents?

The Witness: We do not sell first-run pictures to independents in Philadelphia.

(2055)

By Mr. Raftery:

Q. Mr. Scully, in the downtown first-run area where these pictures play first-run Philadelphia, what type of theatres are they exhibited in? A. I don't understand what you mean.

Q. Are they large theatres or small neighborhood houses? What type of theatres are they? A. These?

Q. Where the first-runs are exhibited on your sliding scale contract? A. Pictures are exhibited at first-class theatres in Philadelphia, as good as there are in any other city.

Q. At the highest admission charge in the city, isn't that right? A. Yes, I would assume so.

William A. Scully—By Defendant—Recross

Q. And your opportunity to earn the 35 per cent depends entirely upon the box office performance of the picture? A. That is right.

Recross Examination by Mr. Wright:

Q. I had this agreement identified. I hand you this printed document marked for identification as Exhibit No. 384, an agreement, between Universal Film Exchanges, Inc. and Fox-Midwest Amusement Corporation, dated January 16, 1939. That is apparently a two-year deal for the 1938-1939, 1939-1940 season. A. Yes, two years.

Mr. Wright: I will offer this agreement in evidence.

(2056)

Mr. Caskey: As I understand it, it is only the printed book that is offered and not the single attached deal sheet, and there is no objection.

(Government's Exhibit 384 for identification received in evidence.)

Recross Examination by Mr. Proskauer:

Q. Mr. Scully, I would like to clear up what seems to be a little confusion here: These papers that were referred to as being in my left hand contain the words "Christmas Holiday." Now, "Christmas Holiday" is the name of a film, is it not? A. Yes.

Q. It does not refer to a time? A. That is right.

Q. Now, Gerson Amusement Company, the New Colonial Theatre—that is an independent, is that right?

Judge Goddard: Is this Philadelphia, Judge Proskauer?

Mr. Proskauer: Yes.

William A. Scully—By Defendant—Recross

A. I would assume so.

Mr. Proskauer: That is true, isn't it?

Mr. Wright: As far as I know, I think it is.

Q. Now, take this form here; that shows, doesn't it, that you leased Christmas Holiday to Warner Bros. for a first-run in the Savoia Theatre for—and I am reading from the column headed "Play date"—for the first, second, third, Theatre—that is an independent, is that right?

(2057)

Q. And for that they paid you \$1,043? A. And 97 cents.

Q. All right, you can have the 97 cents. Now, when you came to the fourth-run you leased it for September 20, 21, 22, 23rd, four days, similarly, four days to Gerson Amusement Company at the New Colonial Theatre, and you got \$550 for it? A. Right.

Q. So for a four day fourth-run you got from Gerson Amusement Company just about half of what you got from Warners for a five days third-run, \$550 in one case and \$1,043.97 in the other? A. That is right.

Q. Now, then, when we come to this next sheet, those were both Warner Bros., so I will leave that one out. When you come to the Ambassador Theatre, that was an independent theatre, wasn't it, William Greenfield? A. Yes.

(2058)

Q. And you leased the picture for four days? A. That is right.

Q. And he paid you for that \$321? A. That is right.

Q. Now, going back to that sheet that I skipped, when you leased to Warner Bros. at the Logan theatre for four days— A. Where?

Q. Right here, look at it, Warner Bros., Logan theatre, for four days, you charged Warner Bros. \$557? A. This is a new sheet. I have not seen this before.

William A. Scully—By Defendant—Recross

Q. Well, whether you saw it before or not, there it is. You charged Warners \$557 for a four-day run of this picture fourth-run? A. That is right.

Q. And you charged Mr. Greenfield \$321 for a four-day run of this picture fourth-run on this sheet? A. That is what they earned.

Q. What? A. That is what they earned, I think, on percentage.

Q. They were on percentage, were they? A. I think so.

Mr. Proskauer: I have just gone into these typical ones. We will take the rest of them up on briefs if there is anything to be said on that. I want to indicate to your Honors merely that in this examination we entirely overlooked in Mr. Wright's cross-examination the length of the run and the character of the ultimate return. That is all.

(2059)

Mr. Raftery: Wait. We have got to separate those things. Some belong to Mr. Wright—

Mr. Proskauer: Render unto Caesar the things which are Caesar's.

Recross Examination by Mr. Wright:

Q. Mr. Scully, you did not want the Court to understand, did you, from this recent examination, that you would never charge or never get from an independent more film rental for a following run than you get from an affiliated theatre for a prior run, did you? A. I don't know. What situation are you talking about?

Q. Well, as between runs, there are frequent situations where your affiliated house paid you less for a prior run in film rental than you get from an independent for a following run, isn't that right? A. Probably in some cases.

Colloquy

Mr. Wright: That is all.

Judge Hand: Any more questions of this witness?

Mr. Raftery: That is all.

Mr. Proskauer: I would like the Court's permission to call Mr. Benjamin Kalmenson—oh, have you something else?

Mr. Raftery: We are waiting for Mr. Caskey.

Mr. Wright: Of course, we might have some examination on that franchise list if we ever get a copy.

Mr. Raftery: You have got a copy.

(2080)

Mr. Wright: Well, we would not be able to do it now. I assume he will be available for further examination on this?

Mr. Raftery: I do not think you will want to examine him after you read it.

This document yesterday that got all mixed up here, nobody knows where it came from or what happened, but I just got word that one of the originals is on the way down. Now, it may require a detailed motion to strike out all of the evidence that Mr. Lazarus gave about the documents that Mr. Wright was examining him on.

Mr. Wright: We would, of course, expect the opportunity to examine him on the original document.

Mr. Raftery: We will bring him down for you.

Judge Hand: Is this the thing that is coming from California?

Mr. Raftery: No. His was coming from California, but I found one in New York. So outside of that I shall suspend now in favor of Judge Proskauer.

Mr. Proskauer: We will call Mr. Benjamin Kalmenson.

Benjamin Kalmenson—By Defendant—Direct

BENJAMIN KALMENSON, called as a witness on behalf of defendant Warner Bros., being first duly sworn, testified as follows:

Direct Examination by Mr. Proskauer:

Q. Mr. Kalmenson, where are you employed? A. I am (2061)

employed at Warner Bros. Pictures Distributing Corporation in New York.

Q. And that is the Warner company which licenses and distributes the motion pictures to exhibitors? A. Yes.

Q. What is your position with the company? A. I am the sales manager.

Q. So that in the general local parlance of the trade you are in charge of distribution at Warners? A. Yes, sir.

Q. How long have you been in that position? A. Since the latter part of October, 1941.

Q. And prior to that—

Judge Hand: Is this the main office supervisor of the whole business at Warner?

Mr. Proskauer: Yes.

Judge Hand: I see.

Q. You are the top of the distribution department? A. I am the general sales manager, sir.

Q. Before you became the general sales manager, what were you before 1941? A. I first entered the motion picture business in Pittsburgh as a salesman in the latter part of 1927. I remained in that capacity until about April 1930, when I was sent to Albany as the branch manager. I remained there until the latter part of 1931, when I was sent to Omaha as the branch manager; was there for a short period, as nearly as I can recollect, about four or five weeks, (2062)

when I was transferred to Kansas City as the branch manager—

Benjamin Kalmenson—By Defendant—Direct

Q. Let me interrupt you a minute, Mr. Kalmenson. Mr. Wright interrupted me to ask you whether all these employments were with Warner Bros.? A. I started with First National Pictures and it became Warner Bros. when the companies were amalgamated.

Q. So it was always with some company or interest which either was Warner or subsequently became Warner? A. Yes.

Q. You have been a Warner boy ever since— A. Ever since my start in the motion picture business.

Q. Go ahead. A. I was transferred in the latter part of 1931—as I repeat, I spent a short period as the branch manager in Omaha, and then was transferred to Kansas City for a very short time; and on or about January 1, 1932, I was sent to Pittsburgh as the branch manager. I remained in that position until some time in 1934, when I resigned from Vitagraph, Inc., and obtained a position with Warner Bros. theatres in the Pittsburgh area as their buyer and booker. I remained in that capacity for approximately two years, when I resigned that position and went back into Vitagraph, Inc., as their central district manager with headquarters in Pittsburgh.

Q. You were distributing again there? A. Yes.
(2063)

Q. So your excursus into the theatre business was a brief two years? A. Yes, sir. I stayed in Pittsburgh as a central district manager for less than a year—I don't remember off-hand the exact time—when I was transferred to New York as the Eastern district manager.

Then in or about 1938 some time I became the Western and Southern sales manager, and in 1941, as I told you, I became the general sales manager, my present capacity.

Q. Now, will you tell the Court just how your sales department is organized and how you do your business? A. I have an assistant who is known as the assistant sales man-

Benjamin Kalmenson—By Defendant—Direct

ager. We have a Western and Southern sales manager, an Eastern sales manager, various and sundry clerical help and departments in the home office for the purpose of conducting distribution. Our field forces are made up of 31 branches throughout the United States, and 31 branch managers, with their individual sales personnel; and we have eight district managers in the United States.

Q. Now, all that organization functions for the purpose of selling pictures? A. Yes.

Q. And when I say selling pictures, of course I mean licensing them for exhibition? A. Yes.

Q. And you have to have, you find by experience in your business, that elaborate organization to go out and market your product among the exhibitors of the country? A. (2064.)

Yes, sir.

Q. And the exhibitors of the country include affiliates and non-affiliates? A. Yes, sir.

Q. Now, since the consent decree, your general policy, I believe has been to sell your pictures singly? A. We started out marketing in groups of five or less, and in the last couple of years we have been selling on a single picture basis.

Q. That is, immediately after the Consent Decree your block booking was reduced to blocks of five? A. Five or less.

Q. Or less. And since the time you mentioned, you found it advantageous to sell your pictures singly? A. Yes, sir.

Q. I see Mr. Wright taking a note. I am sure he is going to ask you whether you have any master agreements of the kind described here yesterday where occasionally you make an over-all memorandum called a master agreement, which recites general terms that are imported into your deal sheets when you sell a particular picture. You do that on occasions, do you not? A. Yes.

Q. That is not very frequent, is it? A. There are some; not many.

Benjamin Kalmenson—By Defendant—Direct

Q. Without holding you to the exact figure, about how many master agreements would you say you had in the (2065)

whole country at this time? A. I do not call them master agreements. We are marketing at this particular time, and for the last couple of years we market our pictures on a single picture basis. We find it necessary by reason of the fact that our printed form of contract has a very small space for additional clauses; we find it necessary to use a letter form to embody all the special agreements which might prevail in these individual situations. I do not call it a master agreement. It is a letter agreement for that particular picture.

Q. It was described here fully yesterday as just a statement of the general terms which do not ripen into a real sale until the deal sheet is made, and the deal sheet imports into itself these general terms that are in what we have been calling the master agreement? A. Yes, sir.

Q. And about how many of those do you have a year? A. To the best of my knowledge there would be very few. I would like to think there were less than ten or twenty.

Q. Now I will ask you a leading question, with Mr. Wright's permission, because I do not think it involves anything controversial, and we will get ahead. The way your pictures are sold—the salesman goes out to the customer, doesn't he? A. Yes, sir.

Q. And he takes from the customer what is called an (2065-A) application? A. Yes, sir.

Q. That application is the form of contract which is already in evidence here as Exhibit 284, I believe. Now after the customer, the exhibitor, signs this form, 284, what happens to it then? A. The salesman sends it to the branch, to his branch manager, who in turn submits it to the home office for approval together with his recommendation.

Benjamin Kalmenson—By Defendant—Direct

(2066)

Q. Yes, I notice on the form there is a space, "Warner Bros. Pictures Distributing Company by" with the legend, "The above signature of Warner Bros. Pictures Distributing Company is made only for the purpose of authenticating this application and is not an acceptance thereof," and then down on the bottom lefthand of the form there is the legend, "The foregoing application is accepted, Warner Bros. Pictures Distributing Company by (blank) General Manager of distribution." That last signature is the one that validates the contract? A. Yes, sir.

Q. And that signature is put on either by you or by one of your subordinates in the main office here in New York? A. Yes, sir.

Q. In fixing your prices, do you make any distinction between an affiliated or a non-affiliated exhibitor? A. No, sir.

Q. In fixing your clearance or any of your other terms, do you take into account in any way whether it is an affiliate or a non-affiliate? A. No, sir.

Q. Referring to clearance a minute, as a matter of fact, clearances have been pretty well set through the country for a great many years, haven't they? A. Yes.

Q. And they have been acquiesced in by exhibitors, producers, independents, affiliates and everybody until there has (2067)

grown up a kind of system of clearance? A. Yes, sir.

Mr. Wright: I do not object to a moderate amount of leading, but I think it ought to be kept to the factual field.

Mr. Proskauer: I do not hear a word.

Judge Hand: Overruled.

Mr. Proskauer: Talk to me nicely, so I can hear you.

Mr. Wright: I said I did not object to leading—

Mr. Proskauer: Off the record, Mr. Davis said to me yesterday that he was a physical wreck from try-

Benjamin Kalmenson—By Defendant—Direct

ing to hear Mr. Wright. I have a stronger constitution and I am not a wreck, but it is an awful strain on you.

Judge Hand: I cannot help it. Go on.

Mr. Proskauer: I think it is a wonderful technique of Government counsel to wear us down.

What was the last question?

(Question and answer read.)

Q. What I mean is, save for the complaints that we have heard of here that came before the arbitral tribunals, you do not very often, or at least you most rarely ever have a question arise as to the negotiation of a clearance? A. Well, clearances have generally been established over a period of years. However, there does arise from time to time (2068)

some dispute about it.

—Q. I know that, but those are rare, are they not? A. Yes, I would say they are rare.

Judge Hand: They may be relatively rare but they make up practically all of these arbitration disputes, don't they, before that arbitration tribunal?

The Witness: Yes.

Mr. Proskauer: Yes. Out of 18,000 theatres there were only about 400 of them. That is one of the things we are going to put in evidence in here in a little more detail on Monday.

Judge Hand: That is painful.

Mr. Proskauer: But your Honor is quite right, most of those disputes related to comparatively, as we shall show, trivial clearance disputes.

Judge Hand: You are trying to make us a sort of a court of appeal over that august board with its own system of reports and jurisprudence.

Mr. Proskauer: Oh, no, we are not going to appeal

Benjamin Kalmenson—By Defendant—Direct

from it. We have been delighted with what they did. We are going to show you that it was the greatest contribution to the stability and decency of this industry that was ever made.

Judge Hand: You may be making statements against interest now. You can't tell.

(2069)

Mr. Proskauer: I didn't hear you.

Judge Hand: You may be making a statement against interest now. You can't tell.

Mr. Proskauer: If I am, I will stand on it.

Judge Hand: All right.

Mr. Proskauer: But I am not.

Q. Some reference has been made here to the use of admission prices with respect to clearance. So far as you know, did you ever, since 1938, make a contract with any exhibitor in which you agreed that you would require a subsequent exhibitor to name any price?

Mr. Wright: If the Court please, I don't think a question like that is proper. The contract speaks for itself as to what the agreement was. If he wishes to elaborate on the form of the contract, all right.

Judge Hand: Overruled.

Q. Do you know of any instance since 1938 in which you ever had in any agreement a covenant on the part of Warner to require a subsequent exhibitor to charge any particular price? A. No, sir.

Q. It is a fact, however, is it not, that in certain portions of the country, particularly in the West, and to a comparatively small extent, contracts frequently refer in the clearance provision to a clearance over subsequent runs that

(2070)

charge a certain admission price? A. Yes, sir, it is.

Benjamin Kalmenson—By Defendant—Direct

Judge Hand: Now you are showing or attempting to show that Warner is free from this alleged taint, is that right, that exists elsewhere?

Mr. Proskauer: No, there is no taint. Nobody, in our view, is tainted for this reason—

Judge Hand: I said "alleged." I am not asking you to admit that you are tainted or anybody else.

Mr. Proskauer: I am trying—

Judge Hand: Far from suggesting it.

Mr. Proskauer: I am trying to show a course of conduct, which I believe is entirely legal.

Judge Hand: No, but I thought you were showing that this situation, so far as you were concerned, was peculiar to Warner's, to some extent, that in the West they have another system.

Mr. Proskauer: Oh, no. No, your Honor, what I am proving—

Judge Hand: All right, then I misunderstood the purpose.

Mr. Proskauer: May I state exactly what I understand the witness's testimony to be? We never make a contract with an exhibitor by which we say we will require a subsequent exhibitor to do something.

Judge Hand: Yes, I understood that.

(2071)

Mr. Proskauer: Most of our contracts do not refer at all to subsequent admission prices as a criterion of clearance.

Q. That is true, isn't it? A. Yes, sir.

Mr. Proskauer: But in a small number of instances, particularly in the West, we sometimes refer to clearance as so many days over a subsequent-run house charging X cents admission.

Judge Hand: I understand.

Benjamin Kalmenson—By Defendant—Direct

Q. I have stated that correctly, have I not? A. Yes, sir.

Q. A very large proportion of these applications that come to the home office are approved, are they not? A. Yes, sir.

Q. Is it very rare that one is not approved? A. It is not rare. Some of them are rejected.

Q. How many times a year would you say you rejected it? A. Well, there—

Q. Oh, just roughly. A. It all depends on the picture. If we are having difficulty getting terms that we think we are entitled to and the boys seem to send in contracts that are objectionable, we send them back. There may be, in some instances, there may be a great number, at least first until we convince our boys as to just what we want them to do. Sometimes they go right through; some pictures go through with few objections.

(2072)

Q. Your criterion in accepting or rejecting one of these applications is whether you think a fair price and fair terms to Warner Bros. have been obtained? A. Yes.

Q. Do you ever accept or reject an application on any consideration that involves whether the theatre is an affiliate or an independent? A. No, sir.

Q. What criteria do you use in selecting the customers to whom you endeavor to sell? A. We try to select the best customer in every situation.

Q. There are many cities in which you cannot sell the best customer, aren't there? A. I would like to think that we find the best customer in every situation, at least for us.

Q. At least that is your endeavor? A. Yes, sir.

Q. Some reference has been made here to the possibility of going out and saying A would give you 30 per cent and B would give you 25 per cent and you want to sell to A. Is it a fact that the percentage is just one element, though an important one, in the advisability of the contract? A. Yes, sir, it is.

Benjamin Kalmenson—By Defendant—Direct

Q. The other considerations, as have been testified to here, are the character of the operation, showmanship of the exhibitor, the size and location of the theatre, its seatage and a number of other elements of that sort. That is correct, is it not. A. Yes, sir.

(2073)

Q. Do you receive any information whatever from your theatre department of Warner Bros. as to what pictures—as to the details of their contracts for the pictures they purchase? A. Do not.

Q. There was put in evidence here by some of the other defendants a form that seems to be usual in the trade, where you get from the theatre department just a list of what they are playing, in the form that I show you here.

Mr. Proskauer: (To Mr. Wright) Just the same as the others. I am not going to give you anything new.

Q. (Continuing). You get a form like that? A. Yes, I get this form.

Q. This also goes to the advertising and to the distribution department? A. I know that it reaches my desk. I don't know just who else in the company gets it.

Q. And through that you get a notion, do you not, of what the public is going to see in your theatres? A. Yes, it acts more or less as a guide as to the type of pictures that the public is accepting; gives you general information as to what business is being done in these Warner theatres.

Q. I put a very illuminating note on my memorandum here. It enables you to feel the public pulse? A. Yes.

Q. As to what they are going to see? A. Yes.

Q. Do you use it for any other purpose whatever? A. No

(2074)

other purpose—if our own pictures were playing on there and some other pictures were playing, it gives you some com-

Benjamin Kalmenson—By Defendant—Direct

parative idea of how your pictures compare in the classification against other pictures.

Q. Do you use the information on there as a criterion in determining whether you will sell your picture or not sell it to any given exhibitor? A. No, sir.

Q. Do you ever take into account in any way what other people are selling Warner's? A. No, sir.

Q. I mean, in the sale of your own pictures? A. No, sir.

Q. How many positive prints do you make of each picture? A. We use about 360 on our better pictures and it ranges down to approximately 175 on some pictures that we have had.

Q. I have a schedule, which I am going to put in later, which uses \$130 as approximately the average cost of a black and white print. That is about right, isn't it? A. That is about right.

Q. Varies between \$125 and a higher figure. How many accounts do you service, generally? A. Oh, some of our better pictures, a good many of them, we have averaged about 14,000 accounts.

Q. And you got to make these 350 prints stretch out among 14,000 theatres? A. Yes, sir.

Q. It has been testified here the positive print takes the (2075)

cost of being sent to one theatre, then it is either sent back to the exchange, in turn to be sent to another theatre, reconditioned at the exchange— A. Inspected.

Q. —or in some instances it may be, on your direction, sent from one exhibitor directly to another, is that right? A. Yes, sir.

Q. But the essential thing is that you have got to stagger the exhibitions of these pictures so that your 350 prints will last for the 14,000 theatres? A. We allocate—

Q. I am using those figures arbitrarily. A. We allocate our prints into the various branches, sufficient to take care

Benjamin Kalmenson—By Defendant—Direct

of their needs consistent with the playing arrangements which prevail in those individual territories.

Q. With respect to your own theatres, where you show your own pictures in your own theatres—of course, Warner shows pictures in Warner theatres? A. Yes.

Q. How do you negotiate with the theatre department for the exhibition of those pictures? A. We sell them those pictures the same as we do everybody else.

Q. And you really have an arm's length negotiation with them? A. Yes, sir.

Q. And that has been going on ever since you have been sales manager? A. Yes, sir.

(2076)

Q. Do you find that the exhibition of your own pictures in your own theatres is of value by way of exploitation, advertising, development and general promulgation of the sales value of the picture? A. Very definitely.

Q. Does that redound to the benefit of both first-run exhibitors and all subsequent-run exhibitors? A. Yes, sir.

Q. Is that one of the outstanding advantages of your having your own theatres in key cities in which to show these pictures? A. That is one of the outstanding advantages, yes, sir.

Mr. Proskauer: We have been taking a tour here of 92 cities. I am going to try to avoid taking that tour, your Honors. And I would like, with your Honors' permission, if the record would show at this point that Government's Exhibit 129, which is our admission of fact, and the interrogatories 6 through 11 inclusive already contain the information as to what our first-run accounts are in all cities, including these 92 or 73, or however you figure it, and I am not going to burden your Honors with going around the whole lot.

Benjamin Kalmenson—By Defendant—Cross

Q. I will ask you this general question: In selecting the customer to whom you endeavor to sell your first-run product in these 92 cities, these 73 cities, or in any city, do you try to get the best available customer that will yield you (2077)

the best revenue? A. Yes, sir.

Q. And is there any other consideration taken into account by you or your department? A. No, sir.

Q. Have you ever used any scheme or device, clearance or anything else, to discriminate or monopolize against any independent exhibitor? A. No, sir.

Mr. Wright: If the Court please, I think there ought to be some limit on the extent to which the defendant's argument can just be put in the witness's mouth. I agree it does not make much difference one way or the other.

Judge Hand: Overruled.

Mr. Proskauer: Now will you stipulate the regular stipulation, that this witness, if asked, would testify as Mr. Zuker did, and as contained in Mr. Skouras's deposition or statement here, in denial of all conspiracy, agreement, and all the other terrible terms which are imported into antitrust cases?

Mr. Wright: So stipulated.

Mr. Proskauer: You may cross-examine.

Cross Examination by Mr. Wright:

Q. Mr. Kalmenson, there was one answer you gave that I did not quite understand, in which you said the exhibition of Warner pictures in your theatres was of some special benefit to subsequent-run exhibitors. Did I understand you correctly? A. I said that they were—what was that question again?

Benjamin Kalmenson—By Defendant—Cross

(2078)

Mr. Wright: Will you read the question?

Q. (Read.)

Mr. Proskauer: What he really said was the exploitation in the first-run theatres.

A. The ability to have theatres and play Warner pictures in them for the purposes of getting them established in territories is of benefit to Warner Bros. and all exhibitors, whether they be subsequent-run, or any particular area, or throughout the entire country.

Q. I just wanted to get what the precise benefit to the subsequent exhibitor was that arises from showing a Warner picture in one of your theatres as distinguished from another first-run theatre? A. The ability to exploit them in the manner that we deem best establishes the picture in that area for that subsequent-run exhibitor, so when he exhibits it, he cashes in on the manner in which we have established the picture.

Q. You establish and exploit your pictures in many areas in first-run theatres that you don't own or operate, isn't that right? A. Yes, that is right, but we cannot get the same cooperation in situations that we don't own or operate, as we do in Warner theatres.

Q. What has that got to do with the subsequent-run exhibitor? A. It establishes the value of the picture for all

(2079)
exhibitors, subsequent-run or otherwise, and that is what I understood to be the question.

Mr. Wright: Were you going to offer this (indicating)?

Mr. Proskauer: I had not intended to. I don't care one way or the other. It is just exactly like the other forms that were in evidence.

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Mr. Wright: Do you want it marked with your number? I think it would be simpler. I would like to have it in.

Mr. Proskauer: I have no choice. If you want it in, you may mark it with my number.

Mr. Wright: I think it would be less confusing if we did make that W-1.

Judge Hand: Is this to be really marked as offered by you or by Judge Proskauer?

Mr. Wright: Well, I am perfectly willing to offer it. I just wanted to make it clear from the number that it was a Warner exhibit produced by Warner, that is all.

Judge Hand: I am not suggesting you offer it, far be it from me.

Mr. Wright: I understand that. Let us have it marked.

The Clerk: As a Warner exhibit or Government exhibit?

(2080)

Mr. Proskauer: Whichever Mr. Wright says.

The Clerk: Is it a Government exhibit?

Mr. Wright: All right, give it the next Government exhibit number.

(Marked Government's Exhibit 385.)

Q. This Exhibit 385, that is a form that you receive daily, is it not? A. Yes, sir.

Q. And the theatres that are listed on the form, those are not all of the theatres that Warner operates, is that right? A. No, sir.

Q. Those are selected, what you call key runs? A. Key, yes.

Q. I believe you testified on your direct examination you did not receive the information as to the details of the con-

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tracts which Warner theatres made with other distributors. What is it you did receive with respect to those contracts?

A. Just this—with respect to what contracts?

Q. The contracts that the Warner theatres make with other distributors. A. I don't receive anything in that connection in any shape, manner or form.

Mr. Proskauer: Except that exhibit.

A. (Continuing) This has nothing to do with contracts. This is simply—let me see if I understand you correctly, (2081)

Mr. Wright. Let us see what it says here. It says here, "Date October 29, 1945, Monday. In the Albany zone, the Strand Theatre in Albany played Uncle Harry as one feature and On Stage Everybody is the second feature. Current day's receipts were \$601 and for the week it was \$10,178," and shows the picture that played the previous week under the same circumstances, and its gross. There is nothing about any contracts in any shape, manner or form in connection with it.

Q. The information that is recorded on the report there marked in evidence as Exhibit 385, that is the only report—the only information you receive as to the terms on which the Warner Bros. theatres license the pictures of other distributors, is that right? A. This is what it says. This is a record of the theatre's receipts. No terms or anything there.

Mr. Wright: Would you read him the question again?

A. (Continuing) The questions don't fit in with this.

Q. (Read.)

Mr. Proskauer: I object to the question because it imports into it that this has information as to the

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terms. I have no objection to a question, is this the only information you receive about what is being exhibited in Warner Bros.' theatres

(2082)

Judge Hand: All right. That is a valid objection. Your question could be modified.

Mr. Wright: That is agreeable to me.

Mr. Proskauer: That is what is bothering the witness.

Q. Is that right? A. This is the only information I receive with respect to these pictures in Warner theatres.

Mr. Wright: Would you read him the question as directed by his counsel, and then let us get a yes or no answer to that.

(Record read.)

Mr. Wright: That is the question you are to answer.

Judge Hand: He has answered it already.

Mr. Wright: That can be answered yes or no.

Judge Hand: No, he just doesn't have to answer it yes or no for some slavish tradition or reason. He has answered it clearly.

Mr. Wright: To me his answer was equivocal.

Judge Hand: I don't see why.

Mr. Wright: Would you read—

Judge Hand: If you want to probe him more on it, go ahead.

Mr. Wright: Would you read the prior answer that he made?

(Record read.)

(2082a)

Mr. Wright: I submit that answer—

Judge Hand: What his answer was is that this is the only information.

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Mr. Wright: —is less extensive than the question. I wanted to get the question answered.

Judge Hand: Ask him about anything else, if you want to, besides the Warner theatres.

(2083)

Q. Is it or is it not a fact, Mr. Kalmenson, that you receive no other information from the Warner theatres as to what pictures they are playing than such as is contained on this Exhibit 385? A. It is.

Mr. Proskauer: Wait a minute. The question was, is it or is it not a fact, and I do not know what the answer means. Would you let me put a question?

The Witness: Let me clarify it.

Mr. Proskauer: Do you get any information—

Judge Hand: No, do not put questions for Mr. Wright.

Mr. Proskauer: All right, I beg your Honor's pardon. I wanted to help him.

Mr. Wright: That fault is mine there.

Judge Hand: That is old stuff.

Q. Is it a fact, Mr. Kalmenson, that the only information that you receive as to what pictures the Warner Bros. theatres are playing is the information contained in reports such as this one marked in evidence as Exhibit 385? A. I don't know as I understand you, Mr. Wright, but that form that was placed before me—

Mr. Wright: I do not see why that cannot be answered yes or no, if the Court please.

A. (Continuing) That form—

Judge Hand: Have the question read to the witness. It is perfectly capable of being answered yes or no.

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(2084)

Q. (Question read.) A. That is the only information I get in those theatres.

Q. Can you just answer the question yes or no? A. I could if I understand it. I am trying to make sure there isn't something about the thing that isn't in accordance with the facts.

Mr. Wright: Will you read the question again?

Q. (Question reread.) A. Well, it is a general question. There are many other theatres. One picture, Warner pictures themselves, I get a report on every one of them, but that is the only report I get, that contained in that sheet, that contains other than Warner Bros. pictures in Warner theatres.

Judge Bright: Do you get any information from any other source?

The Witness: No, sir.

Mr. Wright: That is all.

Mr. Proskauer: That is all.

Mr. Seymour: I have one question.

By Mr. Seymour:

Q. Does Warner Bros. license its pictures for exhibition in some of the theatres operated by theatre operating companies in which Paramount has an interest? A. Yes, sir.

Q. Are the negotiations for those licenses conducted at the offices of those companies, as far as you know? A. They are, with one exception.

(2085)

Q. What is that? A. The Newman theatre in Kansas City, which I understand is negotiated for, with Mr. Hyman in the New York office.

Jason S. Joy—By Defendant—Direct

Q. In the course of those negotiations with the various theatre operating companies for the licensing of Warner Bros. films for exhibition in theatres operated by the several companies, do the negotiations or arrangements which the Warner theatres may have made or may be making for the exhibition of Paramount pictures play any part? A. No, sir.

JASON S. JOY, called as a witness on behalf of defendant Twentieth Century-Fox, being first duly sworn, testified as follows:

Direct Examination by Mr. Caskey:

Q. Mr. Joy, where do you reside? A. 630 Warner Avenue, West Los Angeles, California.

Q. What is your present occupation? A. I am an executive of the Twentieth Century-Fox Film Corporation. I specifically have charge of all professional personnel at the studio with the exception of actors.

Q. How long have you been employed by—

Judge Bright: Exception of what?

The Witness: Actors and actresses, sir.

(2086)

Q. How long have you been employed by Twentieth Century-Fox Film Corporation? A. Since December 1932.

Q. Where is the studio of Twentieth Century-Fox located? A. At 10201 West Pecos Boulevard, Los Angeles.

Q. Will you describe the studio very briefly? A. The studio covers about 350 acres, situated a little west of Beverly Hills, between Santa Monica and Pecos Boulevard. It has 16 sound stages; it has administration buildings, departmental buildings and what we call a back block where our outside sets are erected and remain; it has a large lake and rail facilities, etc.

Jason S. Joy—By Defendant—Direct

Q. Does Twentieth Century-Fox produce motion pictures at this studio? A. Yes, sir.

Q. Do you have under contract a number of producers?

A. Yes, sir, we have sixteen producers under contract.

Q. Tell the Court what a producer is? A. A producer is a man whose responsibility it is to select material, story material, either in play form, story form, or original form, who is capable of supervising its writing, its adaptation to script form, who is competent to supervise the casting of the picture, and who can work with the various departments, wardrobe, set construction and the rest of them in the development of the physical aspects of the production of the picture, and who can supervise its direction, its editing, its (2087)

cutting, its scoring and final release, final form of release.

Q. A man who can start with an idea for a picture and end up with a finished product? A. Yes, sir.

Q. Who was the producer of The House on 92nd Street?

A. Louis de Rochemont.

Q. He is the original producer of March of Time? A. He, as I understand it, he with his brother organized and originated March of Time. Louis came with us—Louis de Rochemont came with us—about a year and a half ago and his first picture was The Fighting Lady, which he made in cooperation with the Navy, and his second picture is The House on 92nd Street, which he made in cooperation with the F.B.I.

Q. Who is the producer of Dolly Sisters? A. Dolly Sisters was produced by George Jessel. That is his first production at the studio.

Q. How large a number of recognized producers are there in the industry? A. That is hard to say, sir, because I haven't tried to count them, but I should imagine that if there were fifty recognized producers that would be—if I should say fifty, that would be about correct.

Jason S. Joy—By Defendant—Direct

Q. Is there competition between Twentieth Century-Fox and the other studios to employ these producers? A. There is always competition in Hollywood on almost every subject, sir, and that includes producers.

(2088)

Q. And have you under contract now producers who formerly were employed by other studios? A. Yes, sir.

Q. Are there producers now employed by other studios which at one time in the employ of Twentieth Century-Fox?

A. Yes, sir.

Q. And these sixteen producers you do not classify as independent producers, do you? A. No, sir.

Q. What is an independent producer? A. In my view an independent producer is a man who is responsible to no one but himself, concerning the financing, the production, the story, the casting, its release. In fact he is the head of a separate company to produce a picture or a series of pictures without reference to anybody else.

Q. Do such independent producers from time to time use the studio facilities of some of these defendants? A. I understand so.

Q. These sixteen that we are talking about are in the employ of the company? A. Yes.

Q. Over them is whom? A. Darryl F. Zanuck.

Q. What is his title? A. He is vice-president in charge of production.

Q. Does he also produce certain pictures himself? A. Yes, sir.

Q. And assist in supervising the production of others? A. All the rest.

(2089)

Q. He was the producer of Wilson? A. Yes, sir.

Q. Does Twentieth Century-Fox have under contract to it directors? A. Yes, sir.

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Q. How many directors does it have under contract? A. I think we have 25 directors who are under term contract and we have three who are under one-picture contracts.

Q. Will you explain that latter phrase? A. Well, a term contract means that a man is available to us for any picture we want him to direct over a period of time. A one-picture deal or a two-picture deal, in this case each of the three is a one-picture deal, they are employed to direct only the picture for which they were employed to work for us. When that period is over they are free to go, unless we want to re-employ them, free to go to some other studio and do whatever they want to do.

Q. What number of recognized directors are there in Hollywood? A. I should say about 300.

Q. Is there competition between Twentieth Century-Fox and the other studios in securing the services of directors? A. Yes, sir.

Q. I hand you page 1935 of the stenographic minutes and call your attention to a list of directors which Mr. Lazarus testified yesterday were directing or producing pictures which were distributed through United Artists. Have any of those directors directed pictures for Twentieth Century-Fox? A. (2090)

Quite a number of them, sir.

Q. Such as whom? A. Alfred Hitchcock did Lifeboat; William Wellman did Thunderbird, and he did other pictures for us; Jean Renoir did Swamp Water; Archie Mayo was a contract director for us, and so was Frank Tuttle, and so was Allan Dwan, and so was Frank Lloyd and Gregory Ratoff. Harold Schuster made two or three pictures for us, the most notable one being The Wings of the Morning, which he made for us in England; and Preston Sturges made one picture for us early—I can't remember the name of it now.

Q. Are some of these directors who are now making pictures which are being released through United Artists so-called independent producers? A. Yes, some of them.

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Q. They have developed or enlarged from the status of director to producer? A. Yes, sir.

Q. How many pictures a year in the current market does a director make? A. That depends, sir, on the type of picture, its budget, its shooting time, and its character. If, for example, you should consider Henry King, who made *The Song of Bernadette*, and then Wilson afterwards, you would consider that a director could make, probably half a picture a year, but if you consider a low budget picture, which has 18 or 24 or 30 days shooting, he might conceivably make four or five a year.

Judge Bright: What does the director do?

(2091)

The Witness: Your Honor, a director assumes command of the picture. He becomes associated with the picture about, usually about two or three months before the final draft of the script is finished. After the first rough draft of the script is finished, usually a director is assigned to it, so that he may then begin the process of the development of the various assistants that he needs, sets, wardrobe, all of the other departments, the mechanical and service departments, that have to come into the making of a picture. He also contributes toward the final draft of the script his own suggestions which are, of course, very important.

Once the picture gets on the stage he is in command. He decides what scenes he will shoot, what angles he will shoot, how the characters will deliver themselves. He looks at the first cut of the rushes—he looks every day at the previous day's rushes and decides on what various takes he will assemble through his cutting into the picture, and he has the first crack—excuse me—first opportunity at the rough cut of the picture before it is sent to his producer and

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the executives of the studio, to help in final assembly of the picture. He is captain of his crew while he is in front of the cameras.

(2092).

Q. And in association with the producer and the executive producer, and possibly others, does he participate in the casting of the picture? A. Yes, sir, most definitely.

Q. Now, in addition to the producers and directors, does Twentieth Century-Fox have a stock company? A. Yes, sir.

Q. What is a stock company? A. In our parlance a stock company consists of any player who is under term contract. Now, by "any player", in our vocabulary is meant anybody from the very top star down to the least, most insignificant dance girl, boy or girl, who has just come in on a very small contract trying to learn the business of acting.

Q. That is, the word "player" is all-embracing? A. "Player" means anybody who is employed to stand in front of a camera.

Q. And what is the definition of "actor"? A. Same thing.

Q. Now, these actors or players, however, are classified, are they not? A. Yes, sir.

Q. And beginning at the top what is the first classification? A. We call them stars, either male or female. Then come feature players; then come bit players; then come specialists, dancers, or, whatever specialty they may have; then come atmospheric people, extras—before atmospheric people, extras who are registered in scenes, and then the crowd, the atmosphere.

(2093)

Q. Mr. Davis wants to know where the Roman populace comes from? A. From Central Avenue, out our way.

Judge Hand: What is all this for, anyway, to show the difficulties or distinction between so-called art? What is it?

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Mr. Caskey: It is to show the circumstances under which motion pictures are produced today, and the fact that these pictures of Twentieth Century-Fox are produced in competition with other companies; that there is no monopoly or attempt to monopolize with respect to any ingredient that goes into motion pictures.

Judge Hand: I do not think you have to go into all this detail to show that.

Mr. Caskey: I will roll along as fast as I can.

Q. Approximately how many persons are under contract at the present time? A. About 125.

Q. And have you the figures there for the past years? A. Well, they run about that—

Q. Some years? A. Yes, anywhere from 120 to 140 or 150.

Judge Hand: These extras and so-called atmosphere players are taken from a pool that any one of the producers can use?

The Witness: Yes, they are not under contract.

Our situation at the moment, we have 125 under
(2094)

contract, of whom around 10 to 15, depending on whose judgment it is, are stars; 110 to 115 are feature players, and stock; and then we employ on the average of 350 free-lance players who are under contract to no one, who are engaged picture by picture by studios. We have under contract 16 multiple non-exclusive players; by that I mean they are engaged to make feature pictures for us, but they may also work for other companies. And we have also four players who are under one-picture contracts to us.

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Q. And this group of players under contract includes actors, feature players, specialists, and the like? A. Yes, sir.

Q. Are there other studios who maintain similar stock companies? A. Yes, sir.

Q. In addition to the stock companies maintained by Twentieth Century-Fox and the other studios, are there a large number of freelance players? A. Probably, of all kinds probably running up to ten thousand—well, no, about seven thousand freelance players.

Q. What is a freelance player? A. A freelance player is one who engages himself to a company for one picture and does not work under a term contract.

Q. Are there persons who are classified as stars? A. Yes, sir.

Q. Who are freelance? A. Yes.
(2095)

Q. Can you name a few? A. Many of those who were named yesterday in releases by United Artists are freelance players. Claudette Colbert, for example, and Ronald Coleman. I cannot think at the moment of a lot of important ones, but some of them are very important.

Q. Are there a substantial number of feature players who are freelance? A. A great many. A great many. There are more than those who are under contract.

Q. Now I call your attention to page 1936 of the stenographic minutes, and a list of the stars that Mr. Raftery assures us are going to play in forthcoming United Artists pictures or have played in very recent ones. Have some of those stars played in pictures produced by Twentieth Century-Fox? A. Gregory Peck was in *Keys to the Kingdom*; Jennifer Jones was in *"Song of Bernadette"*; Linda Darnell was in many of our pictures; she is under contract to us. Dennis O'Keefe is just finishing *Doll Face* for us; Claudette Colbert has worked in several of our pictures; Don Ameche

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was under contract with us for a great many years; Charles Lawton has worked for us; Randolph Scott has been under contract to us; George Raft is under a one-picture contract with us; Victor McLaglen was with us for years; J. Carroll Naish has worked for us frequently; George Sanders has been under contract with us; Jane Powell has worked for (2096)

us once or twice; Constance Moore worked for us; Constance Bennett has worked for us. I think she has a one-picture contract with us now. Gracie Fields was associated with us for years; Rex Harrison is just joining us from England; Constance Cummings has worked for us, and Francis Lederer, Signe Hasso, Gene Lockhart—the last two in The House on 92nd Street.

Q. Now, is there competition between Twentieth Century-Fox and any other studios producing pictures to place stars and feature players under contract? A. Well, the answer is yes, of course.

Q. Is there competition between Twentieth Century-Fox and the other studios to secure particular players for parts in particular pictures? A. Yes, sir.

Q. Is there competition among Twentieth Century-Fox and the other studios in the securing of special acts, name bands and the like for particular pictures? A. Yes, sir.

Q. Do you lend—as the phrase is used—some of these actors and actresses who are under contract to other studios? A. Yes, sir.

Q. Have you prepared a detailed schedule of that for the purpose of your testimony? A. Yes, sir.

Q. Do you lend them to studios which are affiliated with the defendants in this case? A. Yes, sir.

Q. Do you lend them to other producers? A. Yes, sir. (2097)

Q. Independent producers? A. Yes, sir.

Jason S. Joy—By Defendant—Direct

Q. Now, what is the basis for determination as to whether or not you will make a so-called loan of a star or feature player? A. If a person is available so far as work is concerned, and willing so far as his or her own career is concerned, and if the borrowing vehicle, the picture in which he or she is to go, will advance his or her career, or, at least, not hurt it, then we are disposed to loan anybody we have who do not deprive us of that privilege by their contractual relations with us. I think there are only two or three we have under contract whose contract says we may not loan them. But anybody else that anybody wants, if they can prove to us by their script, by the set-up, by the director they are going to use and the balance of the cast, and in any of the several ways that are important, and prove to us that this will help our player and the player is available so far as work is concerned, and willing, then we are happy to loan our people, and it does not make any difference to us what the affiliation is of the borrowing people.

Q. And it is a fact that there are a considerable number of independent producers making pictures in Hollywood at this time who are dependent upon the borrowing of stars and feature players from Twentieth Century-Fox and other studios for the casting of their pictures? A. Yes.

(2098)

Judge Hand: They have their own studios?

The Witness: Your Honor, most of them do not. Most of them rent space in service studios, places that are available for them; and most of them, because they make only one picture at a time, or one picture occasionally, it is impossible for them to own the equipment that is necessary to make a picture, and it is equally impossible for them to employ and keep under contract the stars and the players that they need to make pictures with, and therefore they are dependent upon the freelance market in Hollywood, and their borrowing power from other established studios.

Jason's Joy—By Defendant—Direct

Judge Bright: Would you mind giving an illustration? I have just seen "Along Came Jones." That is an independent production?

The Witness: Yes.

Judge Bright: How was that handled?

The Witness: Well, I am not familiar with that. That was Gary Cooper's picture, wasn't it?

Judge Bright: Yes.

The Witness: I am sorry, your Honor, that I am not going to be able to give you the details that will be sufficiently clear—

Judge Bright: Well, is he a star?

The Witness: He is a star.

Judge Bright: Employed by any one of the
(2099) defendants?

The Witness: No, sir, he is not. As I recall it—and I am not familiar with that particular situation—he made that in association with International and released it through RKO. I think that is right, sir, but I wish somebody who really knows would answer for me.

By Mr. Caskey:

Q. I notice on this list that you have recently loaned Joan Blondel for a picture. A. She was loaned to M-G-M, as I recall it.

Q. And do you recall the picture? A. She is still over there. That is 1945?

Q. 1945. A. We sent three people over for that particular picture; Tommy Mitchell, Joan Blondel and James Gleason.

Q. And are they stars or feature players? A. Well, it would depend upon who says so, they are either stars or feature players. Gleason obviously is a feature player. Sometimes Mitchell has the leading role, but usually we call

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him a feature player, and so would we call Joan Blondel, although she would like not to have me say that.

Q. Her agent would say that she was a star? A. That is right.

Q. Now, I notice that you recently loaned Carol Landis for a picture. To whom was that? A. That is an Arnold (2100) — production, isn't it?

Q. Yes. Who is he. A. Arnold Pressburger; that is an independent producer, released through United Artists.

Q. Is she a star? A. Of a minor calibre. She is more than feature player.

Q. There are even graduations among the stars? A. Yes.

Mr. Davis: One star differs from another star in glory.

Mr. Caskey: And I think, Mr. Davis, you can give me the citation for that.

Mr. Davis: Certainly.

Q. Now is there any distinction as to whether the producer is affiliated or not affiliated with one of these defendants in coming to a conclusion as to whether you will lend a star or a feature player? A. No, sir.

Q. Do you also have under contract camera men? A. Yes, sir.

Q. And other technicians? A. Yes, sir.

Q. Do you secure the services of those men in competition with other studios? A. Yes, sir.

Q. Is it necessary to put a camera man under contract? A. In the business of making motion pictures, sir, the demand so far exceeds the supply of top flight people, that in order to be sure that when an important production is ready for the cameras, that we have a camera man who is skillful enough to handle that production, it has become necessary

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for us to put cameramen under contract. I think we began (2101)

that practice about three years ago.

Q. Twentieth Century-Fox also has on its lot various facilities which from time to time rents or loans to other producers, does it not? A. Yes.

Q. Will you describe some of those? A. Well, for example, we have a large lake on the top of our lot. It is the only lake of its kind in the business out there. We have some ships that actually float and are properly rigged, that are the only ships out there like that. We use our lake only once in a while. Anytime anybody wants to rent it from us when we are not using it, they are perfectly welcome to come, and our production department charges them the same rate that it charges a production of our own for the use of those facilities.

We also have a railroad station and some track and some cars of sorts that we use ourselves occasionally, and we rent those out.

We have the only street that looks exactly like a New England street, to a Westerner at least, and that is loaned out occasionally.

We do rent out our set facilities and we do go to other studios and rent their set facilities sometimes when they (2102)

have things that we need. We do not, because of shortage of material and the availability of facilities—we are not able to rent out sound tracks—I mean sound equipment and camera equipment, and things of that sort, because we are down, as all the other studios are down, and will be until we get replacements.

Q. That is a war-time condition? A. That is right.

Q. Now, in lending or renting these facilities, is there any distinction made as to whether the lessee is an affiliated producer or unaffiliated producer? A. No, there is not. I

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have not any figures here, but I imagine that we rent to the unaffiliated, so-called unaffiliated, much more than we do the affiliated, because they are without these facilities more often than the affiliated ones are.

Q. To your knowledge, has Twentieth Century-Fox ever withheld the use of any of these facilities to a producer who requested it? A. Not if they are available. No, sir.

Q. Do you ever withhold them for the purpose of hampering or impeding the production of another picture?

A. No, sir.

Q. Mr. Joy, what are the sources of the motion picture story? A. Well, they come from all sources: the published play, or book, or story; the unpublished book or play or (2103)

story; an article, which is not fictional, or what we call an original.

Now a book or play needs no explanation. An unpublished book or play comes to us through, or is found by us, or is delivered to us by our story department, and the fact that it is not published or has not succeeded, does not necessarily mean that it is not good material for our purpose, because it may not have been well equipped for the stage, but by our process we may be able to make it into what we call a good story.

The story department—do you want me to continue?

Q. Yes, if you will, tell about the story department. A. Our story department, with offices in Hollywood, New York and London—and before the war they were in Paris, Budapest and Vienna, and other places—and will be again, I hope, bye and bye—we have about 35 people in Hollywood and in the New York offices, and a few of them are executives but most of them readers and researchers and analysts. In London we have three executives and ten readers.

Now the function of the story department is, of course, a very important function. In the first place, they are sup-

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pose to know and catalogue every piece of printed matter in any language that is currently produced. Now the first reason for that—of course their records go back for years and years and years—
(2104)

Judge Goddard: Will you please speak just a little louder.

Mr. Caskey: Turn a little towards the court.

The Witness: I am sorry, your Honor.

A. (Continuing) The first function of the story department is to find material that we can use readily. The second function is to encourage and to direct the writings of important writers toward motion picture material.

The third function is to encourage unpublished writers, new authors, or authors that have had only one publication—encourage and help them in what they are preparing; and the fourth function—I think it might be called the fourth—is to guard ourselves against possible plagiarism suits; and the fifth is to encourage or help the adaptation of what we have purchased, getting it into channels in the studio so they can be transferred into script form.

Now on the subject of helping to guide new writers—for example, Centennial Summer, which we purchased a little while ago, by a man by the name of Idell—he consulted at long length with our people in the development of the story. There have been many instances of that. Then we engage noted writers to write a story specifically for us, not on salary, but which would be purchased when it is finished. We have a man by the name of Galligan, who is now writing a whaling story for us; we did employ John
(2105)

Steinbeck to write the Lifeboat story for us, and we are doing that sort of thing quite frequently.

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Q. What do you do to encourage younger writers? A. We have writing scholarships which we have made available so far only to service men or ex-service men, and women, encouraging them by reason of the money grant to further their education and their experimentation and the development of their writing ability. I do not know exactly how these men are chosen, but they are chosen as a result of examination of material submitted.

Q. So that with respect to printed manuscripts, you from time to time purchase a published book; you from time to time assist or encourage a writer to write a novel which you think will have motion picture possibilities; and you stimulate the writing of material directly for your motion pictures? A. That is right. I did not cover the subject of originals.

Q. No, I have not come to that yet. A. Excuse me.

(2106)

Q. In preparation for your testimony today, did you cause to have an article inserted in the trade papers about the awards to service men? A. No, sir.

Q. Well, there is a reference to it there, is there not? A. Yes.

Q. That gives the details of the award? A. I notice \$1500 is the award given.

Q. Now, in addition to these published books, are a certain number of motion pictures made from original stories?

A. Made from original ideas.

Q. Original ideas, and written by— A. By Staff writers.

Q. Under contract to you? A. Yes, sir.

Q. Give us an example of recently produced pictures?

A. Well, when we call them original, we do not mean that the subject matter or the principal theme is original with us. We mean that we have taken a subject or a theme and have developed it ourselves rather than having bought something from somebody else.

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Judge Hand: Are you responsible for the selection of them in your company?

The Witness: Am I personally, sir?

Judge Hand: Yes, sir.

The Witness: No, sir. Wilson is an example of what we call an original. Purple Heart is an example

(2107)

of what we call ~~an~~ original—if I may refer just a second I probably could give you many—Laura, was not; Take It or Leave It was; Something for the Boys—no. Molly and Me; the Bull Fighters; Billy Rose's Diamond Horseshoe; Nob Hill; Captain Eddie; the Dolly Sisters; The House on 92nd Street. That is, all of this year.

Q. Well, that is enough to illustrate it. Now are these writers under contract, in part at least? A. Yes, sir. We have 28 under term contract; and we have 35 who are on special assignment, or they are on what we call a weekly basis. Now the people who are on contract are there for a year with options; the people who are on a week to week basis are there for just their assignment, and can be continued on with the mutual consent of the writer and the studio. Those who are brought in for one specific assignment usually come for a guaranteed number of weeks, and when that assignment is finished then they are either re-engaged for a new contract for something else, or they depart and go to some other studio.

Q. Now, is there competition between Twentieth Century-Fox and the other studios in the placing under contract of these term writers? A. I think that the most, or perhaps equal, almost, now, to the competition concerning actors and actresses, is the competition concerning writers. There is very keen competition.

(2108)

Q. Does that apply not only to the contract term writers but to the special writers you employ from time to time? A

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Well, that is a little different. There are a great many very competent writers who do not desire to be under term contract. They would much rather work from picture to picture, because they have then the selection and refusal of the work they will do. There is a great deal of competition in the securing of these so-called term writers because they are in great demand by every studio; and there are relatively few of the thirteen hundred that are recognized as writers who are really outstanding writers in the freelance field. So that those twenty or thirty who are outstanding are always in demand, and therefore there is great competition to secure their services or in the securing of their services.

Judge Bright: Who wrote Wilson?

The Witness: Lamar Trotti wrote Wilson.

Judge Bright: Is he one of these freelancers?

The Witness: No, sir. He has worked for Fox and Twentieth Century-Fox since 1932. He is a Georgia boy who came up through the newspaper field and came into Fox as an assistant in the story department; his first story was with another writer, Dudley Nichols, called Judge Priest; and since then he has written Alexander's Ragtime Band; Young Mr. Lincoln; Alexander Graham Bell. He worked on
(2109)

Lloyd's of London, several other stories of that sort; and then two and a half years before Wilson was released he started to work on that.

Judge Hand: These were not preceded by stories?

The Witness: No, sir; although in all of them there is a very great deal of material, background material, research material.

Judge Hand: Oh, yes. We shall adjourn until two-fifteen. This afternoon we shall adjourn at three-thirty.

(Recess until 2:15 p.m.)

Colloquy

(2110)

AFTERNOON SESSION

Mr. Caskey: Mr. Raftery, you want to produce?

Mr. Raftery: In the United Artists testimony, Mr. Wright asked for the production of some grosses on foreign pictures that Mr. Frohlich had put in and I have already given the grosses. Is there anything you want? Do you want them in evidence or what do you want? I am not offering them.

Mr. Wright: Have we got a list of them? That's all right. We can put them in.

Mr. Raftery: You also asked for the contract for Stage Door Canteen. I have a copy which I assure you is a copy of the original, dated June 24, 1943, for the exhibition of Stage Door Canteen in the Los Angeles and San Francisco, California, exchange territories. The percentage terms stipulated are on a sliding scale, starting at 20 per cent low and going to 50 per cent. In that agreement it refers to a schedule—it refers to an agreement dated December 7, 1942, and I have also produced a copy of that.

Mr. Wright: Thank you.

Judge Goddard: With whom is the contract?

Mr. Raftery: Fox West Coast Agency Corporation, as agent.

The other controversy was this, and I think Mr.

(2111)

Wright and I have agreed on it. You will remember yesterday when Mr. Lazarus was on the stand there was a page 6a in a document which Mr. Caskey discovered was not really a part of the document. Well now, that is the fact, so Mr. Wright has asked for the production of all our contracts for that year with the various Fox companies. So I have produced first a document dated the 1st day of September 1941 be-

Colloquy

tween United Artists Corporation and Fox West Coast Agency Corporation. That is the document that had the erroneous page 6a in it, which Mr. Marcus tells me was not produced by United Artists but was given to the Government by one Eddie Small, who released pictures through United Artists. I also have—

Mr. Wright: Can we have that one marked?

Mr. Rafferty: I will give you the whole book. This has nothing to do with that one.

I have an agreement here between United Artists Corporation, dated the 1st day of September 1941, between United Artists Corporation and Fox Inter-mountain Amusement Corporation; an agreement dated the same day between Fox Midwest Corporation and United Artists; an agreement dated the same day between United Artists and Evergreen Theatres Corporation; an agreement dated the same day between United Artists and Fox Wisconsin Amusement Corporation; and the deal sheets are all attached:

(2112)

And this is Mr. Muller's, the treasurer's, original.

Mr. Wright: I would suggest that we have this marked then with the number that was on the withdrawn exhibit, as Government's Exhibit 383, and we will offer this.

Mr. Rafferty: Will you stipulate, Mr. Wright, that all testimony asked in reference to page 6a either by—or all questions asked and all answers given in regard to page 6a of the exhibit that is not in evidence be stricken?

Mr. Wright: I would agree that they be stricken but I would want to have the—that is, I think the substance of what we would bring out if you changed the examination in this way can be handled without

Colloquy

calling Mr. Lazarus back and examining him on the new exhibit that has been put in. Let us see if this won't do it. At page 1962, if my question is changed to read this way, instead of saying, "I notice that on page 6a it refers to test situations in Kansas City, Milwaukee, St. Louis, St. Lake City and Denver", if you substitute for that, "I notice that on page 6 it refers to test situations in the Los Angeles, San Francisco and Seattle exchange territories", then I take it his testimony would be in substance just as it is now, that there is no—

Mr. Rafferty: I have no quarrel with that.

(2113)

Mr. Wright: —problem there.

Mr. Rafferty: I have no quarrel providing it is also our understanding that if he were here he would testify—or, rather, that this contract has to do with theatres in that area that he is talking about.

Mr. Wright: Well, I think that clearly appears, as I say, from the subsequent testimony.

(Marked Government's Exhibit 383.)

Mr. Rafferty: Are you going to offer those other contracts that we have produced?

Mr. Wright: Well, I wanted to see where they fit in. These, I think, should go with an exhibit that is already in evidence, and I was going to ascertain the number of that exhibit and offer these as A and B.

Mr. Rafferty: That is all right, that is, with the deal sheets that you have already put in on the Stage Door Canteen.

Mr. Wright: Yes, it should be. It will be offered and given numbers A and B as soon as I can determine that number.

Mr. Rafferty: Now, as to the rest of the examination, most of it was by Judge Bright, and I think that

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the Court will stipulate with me that as to 6a, anything you elicited based on 6a may go out, as well as what Mr. Wright has talked about?

(2114)

Mr. Wright: Well, as I understand it, the testimony remains in the record as it is with that modification that I suggested?

Mr. Raftery: All right. As long as we have got the facts, that is all that matters.

Mr. Caskey: Now, I should like to have Mr. Wright stipulate with me that I may supply, without calling a witness, the actual percentage which was paid for first-run Los Angeles on Stage Door Canteen under this sliding scale arrangement.

Mr. Wright: Haven't we got that already in answer to interrogatory 6? We do have the actual rental.

Mr. Caskey: We have the actual rental, and I want to show the percentage.

Mr. Wright: The actual gross too.

Mr. Caskey: I think it was 37½ per cent, what it actually worked out to.

Mr. Wright: Well, we have no objection to that.

Mr. Caskey: May I recall Colonel Joy?

JASON S. JOY, resumed the stand.

Direct Examination continued by Mr. Caskey:

Q. Mr. Joy, what is the bargaining process for the acquisition of novels or the screen rights for novels? A. That

(2115)

depends in what manner they are brought to our attention or we find them. Normally literary agents handle literary properties, and unless a property is suitable only for one

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company because they have the kind of facilities that that particular story needs to use, or because that company has a star or players that fit only the story, normally the literary agents solicit the interests of all of the companies. Now, they do that in New York if the literary agent is here by giving an early indication of the type of story that the author is writing and by sending galleys to the various story departments in New York who, in turn, make synopses of them and send them directly to the studios for consideration. If the literary agent has a partner or correspondent in Hollywood—and most of them have—the literary agents in Hollywood call upon the studio story departments personally and try by word of mouth as well as by the synopses which have been submitted to interest the various studios in this particular property.

Sometimes they have a beginning asking price for the property; more often they really throw it open to competitive negotiation. It is not quite bidding, but they will come to us and try to negotiate for a certain amount, and tell us that some other studio is interested in it also; and the result (2116)

is that either a story is sold quickly for a reasonable price, or after consideration it is sold for a large, increased price.

Q. What have you been paying currently for motion picture rights of well known books? A. Well, they, of course, vary, mostly in terms of competition, and somewhat in terms of availability of studio facilities and personnel. We have recently purchased a play—

Q. Well, let us take books first? A. Well, a book, The Dark Corner, which is not yet published but will be, we paid \$40,000 for; The Party Line, the story of a small town telephone exchange, a very simple story, \$35,000; Honeyfogling Time, still unpublished, \$140,000; Daisy Kenyon, still unpublished, \$185,000; Black Rose, which is published and out, \$87,000. For Razor's Edge we paid \$250,000.

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Q. That is the Somerset Maugham book? A. Yes, sir.

Q. And do these prices represent an increase over prices that were paid some years ago? A. Well, I could not say that there have been in times past very high prices paid for certain properties; but on the whole prices today are quite a good deal higher, the average price, the normal prices is quite a good deal higher than has ever been paid before.

Q. What do you attribute it to? A. Well, demand and

(2117)

supply. For example, we paid \$50,000 for *How Green Was My Valley* in the early 1940s, and *How Green Was My Valley* probably was a little wider read than the *Razor's Edge*, but a very fine property, and turned out to be a very successful and interesting picture.

About the same time we paid \$30,000 for *Three Blind Mice*, which was a successful play, and became a very successful property for us because we made it first as a straight picture and then later as a musical.

Q. You say that these books are priced according to the demand and the supply. What represents the demand? A. The demand is represented in this fashion: Normally there are anywhere between 425 and 450 to 500 pictures, feature pictures, made in Hollywood each year. If there are 25 very popular novels published each year, that would be a good many; so that you can see that the demand far exceeds the supply; and that obtains also in terms of plays and in terms of usable magazine stories.

And then there is another reason: The publishing business, the writing, the authorship and the publishing is delayed just as the making of the motion pictures is delayed. It takes time. The change in public demand for pictures comes rather quickly, particularly during a war period and as the war period ceases. And the great supply of stories (2118)

pertaining to war itself are not now usable; so that such stories as we have been buying, and all other companies have

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been buying, during the last six months, are all either, if they relate to war at all, they are about the consequences of war, or about some phases of war; without the battle and bloodshed, and so forth; but mostly they are about other things that pertain rather to the postwar period than exact demobilization and ceasing of hostilities, which makes a further lessening of the supply, and therefore the increased cost of purchase.

Q. You also produce motion pictures from stage plays?

A. Yes.

Q. Current stage plays? A. Well, as current as this: I am not competent to give you the full explanation of the delays in production of stage plays. In some instances I know by hearsay mostly that if a play is purchased it cannot be released as a motion picture for a certain length of time after it has ceased its Broadway run, and so forth; so I imagine in most cases there is a considerable delay; but we have purchased *The Late George Apley*, for example; we paid \$275,000 for it; and we purchased *Chicken Every Sunday*, for which we paid \$275,000; and the last one before that was quite a ways—*Something For The Boys*—which is quite a ways back. We made *Laura*, the story, first, before it was dramatized; and we also made *A Bell For Adano* before it was dramatized.

(2119)

Q. What about *Junior Miss*? A. *Junior Miss*—you are quite correct—we paid \$430,000 for *Junior Miss*, which has just been released.

Q. And you did not release it for exhibition in motion pictures until it had finished its Broadway run as a legitimate play? A. I imagine that is correct, sir. I saw, I only know of this kind of agreements by hearsay.

Q. Now, what do you do with respect to scouting the plays? A. Well, we have, as I started to say this morning, we have a story department in Hollywood, and one here,

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and one in London, and soon. From Hollywood we scout the minor productions, like the Pasadena Playhouse and the University and Little Theatre movements for original plays. We have here a group of people who look at every try-out, if it is within getting distance, Boston, Philadelphia, Washington, and so forth, and we have people who observe each play as it opens, and if they are uncertain they keep on going until they have satisfied themselves we ought to try to have it or not to try to secure it. And the same is true currently in London.

Q. And before the hostilities it was true in Europe also?

A. Yes, in a good many places in Europe.

Q. Now, in scouting these plays and in purchasing the right to produce motion pictures therefrom, are you in competition with the other defendants in this case? A. Most

evidently, yes, sir.

Q. And with other producers of motion pictures? A. Yes, sir.

Q. And has that competition been one of the factors which has increased the price of the material? A. Yes, sir, very definitely, sir.

Q. What are the principal sources of your actors?

A. Well, the following are the sources—which is No. 1 and which is No. 2, and so forth, I don't know—I think the greater number, not the higher quality, but the greater number come from Little Theatre movements and from school plays and people who have had little or no real professional experience; and those people we take in on our stock contracts at a small amount of money and train them in our own school in diction, riding, walking, whatever the things are that are necessary to acquaint a person with motion picture technique, and use them as often as possible on the stages and in front of the cameras to get them used to it, and give them a line here and a line there, until finally, we hope, each one

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we sign—that at least one out of each ten can become a star. I guess that is asking a little bit too much, but we do get a lot of useful talent out of that method.

Another method is the theatre itself, proven people or (2121)

people who have come into the higher class of Little Theatre, summer stock, and so on, who come out for special parts; and another is the radio and show business generally, the entertainment business; and from all of these sources, I suppose, each company—at least I think probably our experience is that we actually sign up five or ten of really potentially fine people each year, and then maybe fifty or sixty are what we call hopefuls. When I say hopefuls, I mean the younger stock company people.

(2122)

Q. Is there competition among the various studios for the services of these people? A. I know that all studios have the same kind of organizations and go through the same motions and have the same successes and failures. There is a very decided competition, because in this also the demand is greater than the supply.

Q. Some of your principal actors come from the legitimate stage? A. Yes, sir. Sir Cedric Hardwicke did. Let me just look at a list here for a moment. Milton Berle came from vaudeville. Lloyd Nolan had stage experience. Jack Oakie had stage experience. Jack Benny came from radio.

Q. That is enough example. A. A good many of them did, of course.

Q. In the production of motion pictures, am I right in saying that the essential elements are a story, producer, director, cast and the mechanical equipment necessary for the photography of the picture? A. Yes, including the writer.

Q. The writer? I should have included the writer. A. Yes, sir.

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Q. Does Twentieth Century-Fox have a control of the supply of any one of those elements? A. No.

Q. And is it in competition with all the other producers of motion pictures for those elements? A. Yes, sir.

(2123)

Q. What type of motion picture does Twentieth Century-Fox make? A. We make, at the West Coast we make only feature length pictures and those, I suppose today, they are divided about 20-10 between what we call high-budget pictures and low-budget pictures. Are you asking me concerning the type of story?

Q. Type of entertainment. A. Well, there is a changing formula. In the late thirties, for example, we were making—well, in 1936 and 1937 we were making what we call pretty much straight entertainment. Beginning about 1938 there came in some pictures that had to do with the war. I think the first was concerning the last war, called *Lancer Spy*. Then gradually as time went on and the interest of the country and the people of the country became more interested in war, more and more pictures concerning the war were made. In 1938 and 1939 we made *Submarine Patrol*, and in 1939-1940 we were commencing to get away a little bit from our biographical period, which we had been in for the last two years, that is, such pictures as "*Young Mr. Lincoln*," and "*Alexander Graham Bell*," and so forth, and by 1941 we were really at it as far as the war is concerned, *Yank in the R A.F.*, *Confirm or Deny*, *Remember the Day*, *To the Shores of Tripoli*, and then *This Above All*.

In 1942-43, *Little Tokyo*, *Berlin Correspondent*, *They Came to Blow Up America*, *Thunder Birds*, and *Immortal* (2124)

Sergeant. *The Moon is Down*, *Crash Dive*, *Manila Calling*, *Fighting Chetniks*, *Margin for Error*, *Night We Raided Calais*, and *Bomber's Moon*, but in that year came the first turn towards something else. We had two pictures that were

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designed to give spiritual comfort to those who saw it, and one picture especially designed and tailored to help the people to commence to think about, to talk about and argue about the peace which was to come, two spiritual pictures, "The Song of Bernadette" and "The Keys of the Kingdom," and the picture designed to help influence people toward the development of a peace was "Wilson."

In 1944-1945 whatever reference to war we had was a sort of left-handed one. Something For the Boys was a story, a musical, how boys could be entertained near a camp; Sunday Dinner for a Soldier was a homey comedy, nothing about fighting; Colonel Effingham's Raid was about the difficulties of a retired soldier in a southern town during the war period. We had, however Bell for Adano, which is the aftermath of the war in Italy and designed to tell us or the audience how we were administering civilian affairs of a town in Italy, and we also had, belatedly, Winged Victory, which showed the training of our AAF boys in this country and a little bit of what they had to go through with when they got abroad.

(2125)

Now we are headed, I think, completely away, unless there be some comedy, I think we are headed completely away from war stories, my guess is, which is no better than anybody's else, irrespective of his experience in this business. How soon we will get back to it again, I don't know. After the last war it took a number of years. It may begin this year, although in the meantime there may be some comedy reference to it.

I think we are looking toward biographical pictures. I think we are looking toward pictures with some social significance and spiritual significance, not necessarily religious, although that is not a tabooed subject whatsoever.

Q: During the last ten years has the cost of producing motion pictures increased? A. Yes, sir, very much.

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Q. Both in the aggregate as to the year's program and on the average? A. Well, in 1940 we produced 44 pictures for a total of \$19,000,000. In 1943-1944 year we produced only 28 pictures for a total of \$35,282,000. The cost of everything in pictures went up very rapidly beginning in about the end of 1941 or the beginning of 1942.

Q. It is a fact, is it not, that— A. I just wanted to give you the comparison.

Q. Go ahead, A. In 1940 we had only five pictures that (2126)

cost a million dollars or more; and in the 1944-45 schedule we had seven that cost over two million and fourteen that cost over a million.

Q. Are these higher costs generally applicable to all the companies in the business? A. Yes, I am certain of that. I am certain it is. And I am certain that it is the result of a combination of all the various factors in motion picture making and not an extravagance on the part of the management at all. Our back lot, for example, costs, the back lot being those who work behind the cameras, like blacksmiths and electricians and so forth, our average hourly increase from 1941 through 1944 was 18 per cent. Our average take-home pay was 71 per cent higher among the crafts on the back lot. All of the items, from nails and lumber, up to the beads and jewelry that go into the making of pictures have increased tremendously. Our manpower has increased in price and is not diminished very much in number, if any, despite the fact we are making fewer pictures than we used to. We are making fewer because that is all we can make under the present restrictions.

Q. During the war and until very recently there were restrictions on the amount of raw stock that could be used?

A. The raw stock, meaning film, on materials, meaning lumber and hardware and everything of that sort. For example,

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(2127)

we were limited to \$5,000 per picture set, I mean for sets for one picture, we were limited to the expenditure of \$5,000 on new material. We might use up any amount of our inventory, if we wanted to. Of course, they commenced to get pretty low before the war was over.

Q. During this period of the last five years has there been an increase in the number of independent producers?

A. Very large number.

Q. Are there a considerable number of individuals who formerly were producers or directors under contract to Twentieth Century-Fox who are now independently producing pictures? A. Yes, sir.

Q. Will you give us a few of those names? A. William Goetz was the executive vice-president of our company. He is now the president or vice-president, I don't know which, of International, and we designate him as an independent producer, because he releases through another company. Nunnally Johnson is an independent producer, having made one or two independent pictures. Frank Lloyd is an independent producer; used to be a director for us; Jesse Lasky used to be a producer for us and now is an independent producer; Milton Sperling, while he is associated with Warner Bros., I understand has a completely independent unit. I am not certain about Mark Hellinger, whether he has an independent set-up at Universal comparable to Walter Wanger (2128).

or not, but I think he has. And Harry Joe Brown, also a former producer of ours, is an independent producer.

Q. In addition to this group of men who have left Twentieth Century-Fox to produce pictures for themselves, are there numerous other independent producers in Hollywood?

A. Many, many more.

Mr. Caskey: You may inquire.

Jason S. Joy—By Defendant—Cross

Mr. Wright: We have no cross-examination.

Mr. Proskauer: I would like to ask just one question.

Cross-Examination by Mr. Proskauer:

Q. These conditions that you have described as to competition for books and plays and manpower, you know enough about the general business around Hollywood to know that applies generally to all companies just the same as it does to you? A. Yes, sir.

Q. And what you have given for your company is a fair picture of what exists for all these companies? A. I think so, Judge.

(Witness excused.)

Mr. Caskey: Mr. Wright, I understand one of your associates asked for a copy of the 1937-1938 contract, and while I am sure that you have a great many copies in your files, I will produce another one. I have nothing further.

(2129)

Mr. Proskauer: I can read in Mr. Warner's testimony that I have stipulated with Mr. Wright. Did you have something you wanted?

Mr. Whittlesey: No.

Mr. Proskauer: It is stipulated that Harry M. Warner, if called as a witness, would testify as follows and this stipulation is made with the same force and effect as though he had taken the stand and been sworn. That is correct, Mr. Wright? Take it?

Mr. Wright: Yes.

Mr. Proskauer: "I am the President and chief executive officer of Warner Bros. Pictures, Inc., and have held that position since the organization of the corporation on April 4, 1923.

Harry M. Warner—By Defendant—Direct

"I have complete familiarity with the fundamental policies of said company and its subsidiaries since its inception.

"I deny that said company is or has at any time attempted to monopolize; or monopolized; any part of the motion picture business, or that it has contracted, conspired or combined with any person or persons, or company or companies, so to do. I deny each and every charge in the amended and supplemental complaint herein.

"In 1906, I and my three brothers, Sam, Albert and Jack, started showing pictures in a storeroom in New
(2130)

Castle, Pennsylvania. The room seated one hundred. The admission price was five cents. We started with \$200.00 capital, but, despite what seemed to us exorbitantly high license fees which we had to pay for our pictures, we soon found ourselves making profit of about \$300.00 a week.

"Subsequently, we went into the distribution of pictures, first at Pittsburgh and later at New York. We had our ups and downs but, on the whole, we were moderately successful.

"In 1916, my brothers, Sam and Jack, leased a small place in Hollywood and started production, while Albert and I arranged in New York for the distribution of pictures, including those of my brothers.

"The beginning of our success really dates from the year 1917, when we produced and distributed a picture from Ambassador Gerard's 'My Four Years in Germany'. It yielded a profit to us of \$130,000.00. In those days, only a few of our pictures were of sufficiently high quality for exhibition in the best first-run theatres in the country, but many other of our pictures proved profitable despite their failure to

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achieve exhibition in the best first-run theatres in the country because of their lower cost. The best first-run theatres will pay much larger film rental than a first-run of exhibition in a smaller theatre, but the cost of producing one of the very finest pictures such as are exhibited in the best first-run theatres is often today more than twenty times the cost of one of the large number of pictures which secure their initial exhibition in less pretentious theatres. As an example, our pictures today average a negative cost of approximately \$1,000,000.00. Some of our pictures, however, cost several million, and some of them as little as \$200,000.00. If the higher cost pictures are successful, they generally yield appropriately large revenues from exhibitors and at the box office, but the low cost pictures are also a fertile source of revenue, especially in the thousands of smaller theatres in smaller communities and at the subsequent-run theatres in the larger communities."

• And as part of this, I am going to call your Honors' attention to some figures which show the enormous importance to use of the independent small theatres.

"On April 4, 1923, we transferred our entire business to a corporation known as Warner Bros. Pictures, Inc. in return for three-fifths of its authorized capital stock. Following incorporation, the business continued as a family affair and along the same lines as the partnership.

"Beginning in 1925, the Warners began the work

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of developing sound pictures under license and agreements from Western Electric, culminating in the production of such sound pictures as 'The Jazz Singer' starring Al Jolson in October, 1927, and the first 100% talking picture 'The Lights of New York' in the summer of 1928.

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"We were at this point far ahead of any of our larger competitors in the 'know how' of making talking pictures.

"A serious difficulty, however, confronted us which we feared might prevent us from realizing a full financial reward on our development of the talking motion picture.

"Our pictures could not be exhibited in theatres which had not installed sound machines, the minimum cost of installation being at that time approximately \$25,000.00 per theatre. Theatres were in those days hesitant to make this outlay because of the public prejudice which had theretofore existed to talking motion pictures owing to the inept and unsuccessful earlier attempts at sound pictures.

"The only way to solve the situation then confronting us seemed to be the rapid acquisition of a large number of theatres. We looked about to see whether, in return for stock in our company, we could acquire a ready-made chain of theatres in sufficient

(2133)

number to assist us.

"As luck would have it, the Stanley Company of America, with about 250 theatres situated principally in and around Pennsylvania and New Jersey, had just lost its chief executive, Stanley Mastbaum, and its directors felt that the company was in need of trained management to take his place. Negotiations were accordingly begun with the view to exchanging stock of Warner Bros. Pictures, Inc. for the stock of Stanley Company of America, a primary inducement to the substantial owners of Stanley Company of America being the experienced management which the Stanley theatres could secure if they were combined with the Warner organization.

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"This transaction, consummated late in 1928, gave us 250 theatres which could be immediately equipped with sound installation. It enabled us to demonstrate to other exhibitors the advantages of sound installation. In the year and nine months immediately following, we likewise were fortunate enough to secure, in a similar fashion, several other circuits of theatres owning theatres in the same general locality and a smaller number of theatres scattered in various other parts of the country. In 1931, we had an interest in 591 theatres, the largest number of theatres in which this company has ever had an interest.

(2134)

"I deny that our theatres, or any of them, were acquired so as not to be in competition with the theatres of any other company, or that there was any agreement or understanding, express or implied, to any such effect. All our theatres were acquired in open competition with any other person or corporation, who or which might have desired to acquire such theatre or theatres. Some of the theatre circuits which we acquired in 1930 and 1931 were acquired in competition with competing companies producing motion pictures.

"Another advantage to our company as a result of the acquisition of Stanley Company of America was the acquisition of Stanley's one-third of the stock of First National Pictures, Inc., a corporation engaged in the production and distribution of silent motion pictures, which had been organized as far back as 1917 by approximately 24 exhibitors on a cooperative basis for the purpose of acquiring film of first quality for exhibition in their own theatres, as well as for distribution by them to other theatres in respective territories in which they operated. The owners of Stanley were

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unwilling to sell the Stanley theatres to us apart from Stanley's First National stock: Since all the stock of First National was subject to a voting trust, it was necessary for Warner to acquire more of the stock of

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First National if it was to be able to use the production and distribution facilities of First National Pictures, Inc. Accordingly, at or about the same time or thereafter, Warner purchased another one-third of the stock of First National from other First National stockholders, and, with its two-thirds' control, dissolved the voting trust. Subsequently, in 1929, Warner acquired the remaining one-third of the stock of First National from Fox. The acquisition of First National thus gave us increased facilities for the production and distribution of pictures, and enabled Warner immediately to double the number of pictures produced.

"The acquisition of First National was not for the purpose of suppressing competition in the field of production or distribution. Before the Government"—and I interpolate, the United States Government—"was fully apprised of the nature of the Stanley acquisition and the consequent acquisition of the stock of First National, it caused to be instituted a proceeding in equity in this Court under the Clayton Act, with a view to causing our company to surrender its interest in First National. After the facts were explained to the Attorney General's office, however, the Government discontinued this suit.

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"Since the peak of its acquisitions in 1931, the Warner companies have had no policy for the expansion of theatre holdings. Today, fourteen years later, Warner has an interest in 547 theatres, a net reduc-

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tion of 44 since its peak holdings of 591 in 1931. Any theatres acquired since then were to protect our business and meet the varying economic conditions, shift of populations, or needs caused by obsolescence that have arisen with the changes over the last fourteen years. Some of the independent competitors of Warner have increased their theatre holdings more rapidly than Warner, and have acquired theatres which Warner had formerly operated. Three such examples in Philadelphia are: Goldman, our theatre manager in the Philadelphia district prior to 1933, at a yearly salary of \$78,000.00, left our employ in that year (while his contract still had nine months to run) to go into the exhibition business, and has, since that date, acquired a chain of theatres in the Philadelphia territory which, as Goldman testified, have yielded him a profit of more than \$100,000.00 a year, exclusive of the Keith, Karlton and Erlanger Theatres now to be mentioned. The first two are downtown theatres, formerly operated by Warner but which, while Warner was operating them, were acquired by Goldman in direct opposition with Warner. The Erlanger

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was a theatre in which Warner acquired a one-third interest through the Stanley Company of America, but which had proved so unsuccessful by 1931 that it was abandoned by its co-owners, and in 1932 Warner had paid \$400,000.00 to be relieved of its obligation on the mortgage bond, abandoning the theatre. Warner could have re-acquired this theatre at any time after 1932 up to 1941 when Goldman leased it, and is now running it in competition with Warner. Incidentally, another one of Warner's best theatres in Philadelphia, which it had under lease from Fox since 1936, has recently been surrendered by Warner and returned

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to Fox. Warner has never sought to acquire all of the best first-run theatres in downtown Philadelphia. They were all in common ownership at the time of the acquisition of the Stanley Company of America, with the exception of the Fox Theatre, which was rented from Fox in 1935 at Fox's request.

"The Government has, I am informed, charged that Warner conditions the licensing of its pictures to the other major defendants on the other major defendants license of their product to the Warner theatres. I deny any such conditioning of licenses.

"To make certain that the distribution and exhibition branches of my company would each operate at highest efficiency, and each respectively attempt to

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earn the greatest amount of money possible for the company—I have insisted that each department operate as a unit, separate and apart from the other department, and that if any question should arise which affected more than one department, the question should be cleared through me directly.

"Before our company acquired theatres, its profit came, generally speaking, from pictures which were not of a quality sufficient to justify what the Government describes as 'first run', or what might more accurately be described as a first run in the very best theatres in the downtown districts of large cities. As our quality improved, a large number of our pictures found initial exhibition in the very best theatres in the hearts of the centers of the population. But, with the increase in quality and the intense competition between producers, the costs skyrocketed and consequently we had to depend upon a greatly increased revenue to produce the higher quality pictures.

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"In the past our foreign business has been exceedingly profitable, but with the cessation of the war our foreign markets are being severely restricted. Country after country is adopting quota systems and state monopolies in order to promote their own motion picture production. During the war England, our chief foreign market, was unable to produce its own pictures. Hence we were able to derive a very substantial revenue from England. At one time during the war England threatened (and did for a time) block our funds derived from exhibition in England and was only dissuaded from doing so by being convinced that the American companies could not continue to supply England with quality productions if their English revenue were shut off altogether. With the cessation of hostilities, England is launching on production on a large scale and the dangers of a quota system or restrictive measures in some other form are pressing. The more our foreign revenues decrease, the more vital it will be for us to have the profits from our theatre operations in order to maintain our present standard of production.

In this industry the public may see within a comparatively short time every picture at whatever price it prefers to pay and every exhibitor we license may exhibit the same pictures in its theatre at whatever price it prefers to charge depending upon its policy of

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operation and the price level to which it caters.

"Most of the seventeen thousand-odd theatres in the United States are able to license the same product within a comparatively short space of time at rentals below the cost of the positive price which they project on to their screens. Thus, a positive print of our picture which had the greatest number of book-

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ings in 1943/44, 'Princess O'Rourke', cost about \$130.00. Out of a total of 14,090 bookings, 12,926 were for an average price of \$78.40, or substantially less than the cost of the positive print. These figures have been furnished to me as compilations from the Warner 1945 Answers to Interrogatories 6 through 11, submitted in evidence by the Government, and may be verified from said interrogatories. The remaining 1,164 bookings averaged approximately \$943.

"This structure of the industry will, in my opinion, be jeopardized by divorcement of theatres from production, with hardship not only to our company but to the attendance of many millions who go to the motion picture theatres in the United States, and the approximately 15,000 independent theatres in this country."

Now the rest of this statement consists of a repetition, Mr. Wright, as you know, of the identical questions that appeared in Mr. Skouras's statement, and I am going to suggest to the Court, if Mr. Wright will

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consent, that the stenographer just copy those in without my burdening your Honors with listening to them.

Mr. Wright: That is agreeable.

(The questions and answers referred to are as follows:)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to restrain competition in the production, distribution or exhibition of motion pictures in the United States?

A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of

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them to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competitive terms? A. No.

"Q. Has there been any agreement or understanding to your knowledge to withhold any of the production personnel and equipment from any producer of motion pictures? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independent producers from access to production personnel and to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants in (2142) this case? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement among the defendants or any of them to license any pictures for exhibition in any theatre before the pictures have been produced and before any exhibitor has had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or trade shown? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of one or more films or group of films upon the licensing of another film or group of films? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of film in one theatre or group

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of theatres upon the licensing of film in another theatre or group of theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of the circuit? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them in licensing their pictures to favor the theatres in which the defendants or any of them had an interest against the theatres of exhibitors not affiliated with any producer-distributor with respect to run, clearance, license fee or any other terms of licensing? A. No, sir.

(2144)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any two or more of them to license pictures for exhibition in the theatres in which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures distributed by the others? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independently produced motion pictures from theatres in which the defendants or any of them had an interest? A. No.

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"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from the operation of competing first run theatres in cities and towns where theatres affiliated with defendants or any of them are located?

A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent run (2145)

affiliated theatres in the cities and towns where affiliated theatres are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to use the first and early run affiliated theatres to control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in the cities and towns where affiliated theatres are located, or elsewhere?

A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them as to the terms upon which each or any of them would license their film to unaffiliated exhibitors? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to deprive any theatre operator of the supply of film or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any (2146)

of them to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations? A. No.

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"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into joint agreements with respect to a theatre whereby the film buying control or proceeds from the operation thereof is divided between two or more exhibitor defendants for the purpose of restraining competition unreasonably or monopolizing exhibition or distribution with respect to such theatre? A. No."

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres? A. No.

(2146-A)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or any city or town thereof? A. No."

(2147)

Mr. Seymour: Mr. Wright, we might perhaps at this point put in the stipulation in regard to Mr. Barney Balaban which I spoke to you about the other day.

Mr. Wright: I don't seem to remember about that.

Mr. Seymour: The questions negating conspiracy. You said you would stipulate.

Mr. Wright: Yes, that is all right.

Mr. Seymour: It is stipulated that if called Barney Balaban, president of Paramount since 1936, would answer in the negative the questions put to Mr.

Colloquy

Zukor; and that this stipulation has the same force and effect as if he were actually called as a witness.

Is that agreeable, Mr. Wright?

Mr. Wright: Yes.

Mr. Proskauer: While we are in a stipulating mood, may we have the same stipulation as to our branch and exchange managers and our other officers?

Mr. Wright: Oh.

Mr. Proskauer: Well, you made the same stipulation with respect to the others.

Mr. Wright: We will discuss that question with you, but that has not heretofore been brought up.

Mr. Proskauer: I beg your pardon?

Mr. Wright: There is no point of trying to put in a wholesale group of stipulations. We have confined it heretofore.

(2148)

Mr. Proskauer: All right. Now, I think Mr. Niesley was going to offer that definition of Mr. Bernard. Are you ready to have that read in or do you want that to go in Monday?

Mr. Niesley: To go in Monday.

Mr. Frohlich: If the Court please, I have just completed the preparation of the line as to the picture Cover Girl for the season 1943-1944, which Judge Hand suggested early in the trial, giving the rentals received. I should like to offer it in evidence. I will give Mr. Wright a copy of it.

Mr. Wright: We have no objection.

(Marked Defendant Columbia Exhibit C-9.)

Mr. Proskauer: Mr. Wright, I am going to ask for a very innocent stipulation now, that the corporate name of the Vitagraph, Inc. has been changed to Warner Bros. Distributing Corporation, Inc., the same corporation with a changed name.

Colloquy

Mr. Wright: I believe that appears in the data you furnished on the supplementary interrogatories.

Mr. Davis: If the Court please, I have a stipulation in behalf of Loew's, but if the Court wants to recess at 3:30 precisely, I had better not begin it.

(2149)

Judge Hand: All right.

Now, are you all through except Mr. Leisure, practically? Is that your last?

Mr. Davis: No, sir. I have some statistical data and some exhibits I want to put in, and I want to call one very short witness on Monday.

Mr. Proskauer: We have some statistical data also, which we do not want to put in at this late hour.

Judge Hand: I think you have done wonderfully well. I think Mr. Wright started out with a splendidly abbreviated program, and you have all cooperated in shortening the case, which looks to me now as though it were nearly ready for rebuttal. Mr. Leisure's representative here, Mr. Whittlesey, says that he expected to take about a day.

Mr. Whittlesey: That is correct.

Judge Hand: Is that right?

Mr. Whittlesey: Yes. We will start on Monday.

Judge Hand: Will you be ready to go on?

Mr. Whittlesey: We will be ready to go on.

Mr. Seymour: And I shall have a very short witness, perhaps, Monday.

Judge Hand: I see. I am sure all of us here thank you very much, because I think in the end it will add to clarity and everything else.

(2149a)

Now we shall adjourn to Monday at 10:30.

(Adjourned to Monday, November 5, 1945, at 10:30 a.m.)

Wilfred J. Eadie—By Defendant—Direct

(2150)

New York, November 5, 1945;
10.30 o'clock a.m.

Trial resumed.

WILFRED J. EADIE, called as a witness on behalf of the defendant Twentieth Century-Fox, being duly sworn, testified as follows:

Direct Examination by Mr. Caskey:

Q. Will you give the address of your residence to the reporter. A. 14 Overhill Road, New Rochelle.

Q. What is your occupation, Mr. Eadie? A. I am comptroller of Twentieth Century-Fox Film Corporation.

Q. Are you also a director? A. And a director.

Judge Bright: What did you say you were?

The Witness: Comptroller.

Q. How long have you been comptroller? A. Since 1932.

Q. Mr. Eadie, during the 1943-44 season how many pictures did Twentieth Century-Fox distribute? A. May I refer to my papers?

Q. Yes, indeed. A. Released 34 pictures.

Q. How are those pictures classified? A. 26 were produced by the corporation, one was purchased, one was distributed for an outsider, four were reissues and two were (2151)

documentary films.

Q. What was the total negative cost of those 34 pictures?

A. The pictures produced by the corporation itself cost \$28,211,902.

Q. Will you speak louder? A. \$28,211,902.

Q. What additional cost was there? A. Costs of distribution.

Wilfred J. Eadie—By Defendant—Direct

Q. How much were they? A. They were at least 13 million dollars.

Q. That gives you an aggregate of how much? A. Over 41 million.

Q. What was the domestic revenue from the United States on those pictures? A. 34 pictures in the United States, \$40,657,152.

Q. Is it fair to say that the cost of producing and distributing the pictures in the United States does not equal the domestic revenue? A. The cost of the pictures exceeded the domestic revenue.

Mr. Davis: What was that question?

Mr. Caskey: Speak a little louder.

(Question and answer read.)

Q. Has that been true over at least the last nine years?

A. Yes, sir.

Q. Mr. Eadie, have you prepared—

Judge Bright: When you say the United States
(2152)

that does not include Canada?

The Witness: No.

Q. (Continuing)—have you prepared a chart showing for the last nine years the number of pictures released by the company and the negative cost and the average negative cost? A. This chart covers ten years.

Q. Ten years?

(Marked Defendant Twentieth Century-Fox's
Exhibit F-16 for identification.)

Q. This Exhibit F-16 shows the negative cost and the average negative cost during the last ten years? A. Yes, sir.

Wilfred J. Eadie—By Defendant—Direct

Q. And what is the increase in the average cost of the pictures? A. The season 1935-36, the average cost of a picture was \$376,014; the season 1944-45, the most recent season, the average cost of a picture was \$1,350,000, an increase of almost a million dollars.

Mr. Caskey: I offer F-16.

Mr. Wright: If the Court please, the purpose of the offer is not apparent to us. I do not see what this increase in costs has got to do with any aspect of the case or what this is supposed to prove.

Judge Hand: It may have some bearing on reasonableness, I don't know.

Mr. Caskey: Exactly.

Judge Hand: I don't know whether his claim is that he has to have theatres in order to get anything, (2153) really, out of it. It might be hard to demonstrate that in general, inasmuch as three of your independents make a lot of money here without any theatres.

Mr. Wright: Everybody likes—

Judge Hand: I don't know; it is just as clear to me as some of your evidence. That may be my own mental defect, and it may be the difficulty of the subject; it may be the fault of counsel; I don't know. I can't attempt to pass on that, but I will allow the exhibit to go in.

(Defendant Twentieth Century-Fox's Exhibit F-16 for identification received in evidence.)

Mr. Proskauer: We are going to have a similar schedule and when I put it in I will try to indicate to your Honor why it is important.

Judge Hand: I have doubt whether physically it will emerge.

Wilfred J. Eadie—By Defendant—Direct

Q. Have you also prepared a schedule showing the negative cost and the average negative cost over the last nine years and the domestic film rental from those pictures? A. Yes, I have.

Q. The revenue on the 1944-45 pictures has not yet been fully received, has it? A. That is correct.

Q. There is some slight revenue yet to be received on the (2154) 1943-44 product? A. Yes, sir.

Q. What is the total amount of the domestic film revenue during those nine seasons? A. The total is \$282,596,433.

Q. What is the cost of distributing those pictures in the United States? A. The cost is, at least, conservatively, 40 per cent, and that would equal \$113,038,573.

Q. And leave how much? A. We have left \$169,557,860.

Q. As against negative cost of how much? A. \$215,944,644.

Q. So that the domestic revenue, after paying the cost of distribution, was \$46,000,000 short of paying for the negative cost? A. Yes, sir.

Mr. Caskey: I offer F-17 for identification in evidence.

Mr. Wright: Same objection. There is no apparent relevancy that I can see in these figures. May I say this, your Honors, in elaboration of our objection, as I understand it, there is no suggestion in any of the proof that has been offered that these costs have not been passed on to the public, or that the distribution and production and exhibition of these pictures has not been enormously profitable to these companies. I just do not see where this leads.

Mr. Proskauer: That proof will be supplied by us. (2155)

Judge Hand: That sounds as though there is a charge against Mr. Caskey of inadequacy.

Wilfred J. Eadie—By Defendant—Direct

Mr. Proskauer: That is the last charge you can levy against Mr. Caskey. I am sure he is going to supply it; but I am going to show that that with this enormous increase in cost, substantially none of it has been passed on to the public.

Judge Hand: I did not know you were going to take a competitive position, even among counsel. It is received.

(Defendant Twentieth Century-Fox's Exhibit F-17 for identification received in evidence.)

Q. Mr. Eadie, have you made an analysis of the sources of film rental, domestic film rental since 1933 as among Twentieth Century-Fox theatres, the theatres of the other four defendants, and independents? A. Yes, sir.

Mr. Caskey: Will you mark this for identification, please.

(Marked Defendant Twentieth Century-Fox's Exhibit F-18 for identification.)

Q. Will you describe to the Court Defendant's Exhibit F-18 for identification? A. This is an analysis of rentals, complete domestic totals from 1933 through 1944. It is analyzed between the amounts received from each of the defendant companies.

(2156)

Q. Now, taking 1944 for an example, the figure of \$47,659,900 is what? A. That is the domestic revenue, total domestic revenue, including Canada.

Q. And the revenue on feature pictures alone? A. No; it includes features, shorts, news, advertising, accessories; total billings.

Q. And this is on a fiscal year basis, is it not? A. Yes, sir.

Wilfred J. Eadie—By Defendant—Direct

Q. And is not allocated to motion picture seasons? A. No, sir.

Q. But this is the way the records were kept in the office of the company? A. Yes, sir.

Q. Now, what percentage of that total domestic revenue comes from theatres in which Twentieth Century-Fox has an interest? A. 14.12 per cent.

Q. That is, treating the whole as a dollar, 14 cents comes from theatres in which Twentieth Century-Fox has an interest? A. Yes, sir.

Q. What percentage comes from the theatres in which Loew's has an interest? A. 1.26 per cent.

Q. That would be $1\frac{1}{4}$ cents? A. Yes, sir.

Q. What percentage from the theatres in which RKO has an interest? A. 5.52 per cent.

Q. And what percentage from theatres in which Warner has an interest? A. 4.82 per cent.
(2157)

Q. Now, at my instructions did you group together all of the theatres in which Paramount has an interest? A. Yes, sir.

Q. And treating them as one for the purpose of this chart, what percentage came from those theatres? A. 13.46 per cent.

Q. And what is the total then from the five? A. The total affiliated is 39.19 per cent.

Q. And eliminating Fox, the total is what? A. 25.07 per cent.

Q. So that of the domestic revenue, 25 per cent comes from theatres which are affiliated with one of the four defendants? A. Yes, sir.

Q. And 14 per cent comes from the theatres affiliated with Fox? A. Yes, sir.

Q. And the balance from all the other theatres in the country? A. Yes, sir.

Wilfred J. Eadie—By Defendant—Direct

Mr. Caskey: I offer that in evidence.

Mr. Wright: We have no objection to this exhibit.

(Defendant Twentieth Century-Fox's Exhibit F-18 for identification received in evidence.)

Mr. Seymour: May I see that, please?

(Exhibit handed to Mr. Seymour.)

Mr. Seymour: If the Court please, I think Mr. (2158)

Caskey has made it plain in his interrogation of the witness that for the purpose of this statistical comparison he has treated all of the theatres in which Paramount has an interest together. The heading here is simply "Paramount," but on the basis of the testimony there are no payments from Paramount as such, but from these various theatre companies which are individually operated.

Judge Hand: This statement, as I remember it, is evidence of what you said in argument at the beginning, 40 per cent of the whole business as against the independents; isn't that so? Isn't what you said? Perhaps it is what the Government said. I had it in my notes somewhere.

Mr. Seymour: I think various percentages have been mentioned. I do not remember myself mentioning 40 per cent. The point I want to make plain is that this exhibit gives certain figures received from Paramount, which is merely a convenient label given by the witness and Mr. Caskey for that purpose.

Judge Hand: Yes.

Q. Mr. Eadie, do you know where the revenue that comes from the theatres associated with or in which Paramount has an interest is paid? Do you know where the company gets

Wilfred J. Eadie—By Defendant—Direct

the revenue? A. The bulk of it comes from Paramount in New York, but we receive it in exchanges throughout the (2159)

country where Paramount have theatres or interests.

Q. And it is received at the various exchanges throughout the country? A. Yes, sir. This analysis is made up from the information that we have in our records that these are Paramount or Paramount-controlled theatres. I might add, that is the opinion of the exchange manager servicing these theatres throughout the country.

Q. And that is how the chart is made up? A. Yes, sir.

Mr. Caskey: Will you mark this, please, for identification.

(Marked Defendant Twentieth Century-Fox's Exhibit F-19 for identification.)

Q. Now, Mr. Eadie, have you made a distribution of the revenue on these 44 pictures released during the 1943-44 season? A. 34 pictures in the 1943-44 season, analyzed in various ways on this schedule.

Q. First of all, what is the total film rental? A. \$40,657,152. That is up to March 31, 1945.

Q. And that is from the United States only? A. Yes, sir.

Q. Now, taking it first of all by population groups—

Mr. Wright: Is this another chart?

Mr. Caskey: Yes (handing copy to Mr. Wright).

Q. How much of the revenue came from the theatres in the cities which have a population of 100,000 or more? A. (2160)

A total of \$18,329,890.

Q. And that is what percentage of the total revenue? A. 45.1.

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Q. Now, how much of it came from the group of cities that had a population of twenty-five to a hundred thousand?

A. \$7,075,966; a percentage of 17.4.

Q. And how much of it came from the balance of the country? A. \$15,251,296. The percentage is 37.5.

Q. Now, what percentage of that 40 million dollars revenue do you attribute to the affiliated theatres? A. About 40 per cent.

Q. And you have arrived at that 40 per cent on the basis of the calculations contained in Exhibit F-18? A. Yes, sir.

Q. The percentage on F-18 was 39.1 per cent? A. That was the maximum percentage, yes.

Q. And you have used 40 per cent here? A. Yes, sir.

Q. And applying the 40 per cent to the \$40,000,000 figure, what dollar amount of revenue came from the theatres in which the five defendants had an interest? A. A total of \$16,262,861.

Q. Now, are you able from your figures to distribute the revenue which came from the communities of less than 25,000 among the five defendants? A. In total, yes, sir.

Q. But can you distribute that among each of the defendants? A. No, sir, not within the time we had at our disposal. (2161)

Q. Now, of this \$16,262,000, how much of it came from these cities which have a population of 100,000 or more? A. \$11,425,754; a percentage of 28.1.

Q. Of the total revenue of the country? A. Yes, sir.

Q. And of that 28.1 per cent how much of it came from the theatres in which Twentieth Century-Fox has an interest? A. 10.3 per cent.

Q. And the balance of 17.8 per cent is derived from theatres in which the other four have an interest? A. Yes, sir.

Q. And what percentage was derived from the theatres which are classified as independent in those same 92 cities? A. 17 per cent.

Wilfred J. Eadie—By Defendant—Preliminary Cross

Q. So that confining yourself to the 92 cities which have a population of 100,000 or more, 10.3 per cent of the total domestic revenue comes from theatres in which Fox has an interest? A. Yes, sir.

Q. And 17.8 per cent comes from theatres in which the other four defendants have an interest? A. Yes, sir, 17.8 per cent.

Q. 17.8 per cent? A. Yes.

Q. And 17 per cent comes from theatres in which none of the defendants have an interest? A. Yes, sir.
(2162)

Mr. Caskey: I offer Exhibit F-19 for identification in evidence.

Mr. Wright: There are a couple of questions I would like to ask him preliminarily before it goes in.

Preliminary Cross Examination by Mr. Wright:

Q. In preparing this exhibit identified as F-19, did you work from the interrogatory figures you had supplied the Government in the interrogatory answers as to the 1943-44 film revenue? A. Well, we worked from our books and records. I presume the other figures were taken from the same source.

Q. Well, what I am getting at is this: Is there any difference in this total that you have given us here for first-run revenue in the communities of over 100,000 population and the total to be derived from your interrogatory answers giving the same figures? That is what I want to know. A. Well, I can't say, sir. I do not have the other for comparison, but these figures are prepared from our books and records.

Q. Well, you did not make any check to see whether the data here corresponds with similar data derived from your interrogatory answers? A. No, sir.

Wilfred J. Eadie—By Defendant—Preliminary Cross

(2163)

Q. This 40 per cent figure that you had at the bottom, as I understand you to say, you say that that was some kind of an arbitrary allocation you made in the first instance?

A. We used a figure in excess of the highest figure shown by our analysis in order to be on the conservative side.

Q. This 40 per cent was for an arbitrary figure, is that right, the arbitrary percentage? A. Well, we were unable to determine the exact figure and that is within, I would say, one per cent of the correct figure.

Q. Then you took your 40 per cent figure and you applied that to what? What was the starting figure that you actually got out of the books? A. The total rental \$40,657,152.

Q. That is your total rental as per your books? A. Yes.

Q. Then you made your best guess as to distribution between independent and affiliated theatres; that is, you assumed the percentage of 40 for the affiliated theatres, and a percentage of 60 for the independents, isn't that right? A. Not quite. We have a detailed analysis of the 38.2 per cent of the 40. That is a computed figure from the records. The estimate, the difference which we do not have analyzed, is 1.8 per cent of the total.

Q. Down to the communities of less than 25,000 the figures you have there represent actual computations from (2164)

your records in all cases, is that it? A. Yes, sir.

Q. And it is only the communities of less than 25,000, then, where you made an arbitrary estimate of the percentage distribution, is that right? A. Yes, sir.

Q. Did you make any check in these figures as to the data as to the towns of 25,000 to 100,000 to see whether there was any variation between the percentage results you got here and the percentage results you would have from computations based on the selected pictures that were given in the interrogatory answers? A. I did not make a comparison between the interrogatory answers and this computation.

Wilfred J. Eadie—By Defendant—Preliminary Cross

Q. That is, you know that you furnished in response to interrogatory answers your film rental on, I believe, a single picture for all of the towns of between 5,000 and over.

Mr. Caskey: No, Mr. Wright, we did not furnish that. You never asked for it and we never furnished any such thing.

Mr. Wright: No, I beg your pardon. That is right. On a single picture with respect to certain selective runs, that was what I believe you furnished.

Q. You made no computations, then, with respect to the total percentages of rental reflected in the interrogatory answers that you furnished, is that right? A. I did not refer to the interrogatories at all in making this schedule up. The (2165)

answers were both prepared from the same source. Whether they are the same material or not, I can't say—recall. We answered them both correctly to the best of our ability.

Q. In determining which theatres were to be included in what you term here Twentieth Century theatres, what criterion did you use, those that they controlled? A. Those are all the theatres serviced by National Theatres Corporation, and ourselves.

Q. That includes theatres for which they bought films but in which they might not have a proprietary interest? A. Yes, sir. If the billing was made by the exchange to, and bill paid for by National Theatres Corporation, then it is in this group.

Q. As to the other defendants' theatres, what was the test that you used there in determining which theatres were included in that category? A. The same test.

Q. As to whom you billed for the product? A. Well, the determination of the classification of theatres was made by the manager in the exchange.

Wilfred J. Eadie—By Defendant—Preliminary Cross

Q. Was a uniform criterion—were uniform criteria employed? A. Yes, I believe so.

Q. What was it? What did you tell him to do when he made the classification? A. We asked them for the analysis of the rentals by the affiliated companies.

Q. What was he supposed to do in determining which (2166) theatres were supposed to be classed as affiliated and which not? A. Supposed to use his best judgment.

Q. Then you did not give him any set standard for making that determination, is that right? A. We simply asked him for the rentals and the theatres of the various affiliates.

Q. So that in situations where there might be a minority interest you don't know whether those are included in here or not? A. In all cases where we knew the pictures were being bought for or by Paramount, or, for example, they were in Paramount theatres.

Q. I am talking about a situation where Paramount or some other distributor might have a minority interest in certain theatres. Do you know how those were computed on your chart here? A. If the manager believed—if the exchange manager believed them to be Paramount theatres, they were scheduled as Paramount theatres.

Q. But as to what—how the judgment was exercised in any particular instance you don't know, isn't that, right? A. No, sir.

Mr. Wright: If the Court please, on the basis of the witness's testimony I do not think we have here a very illuminating document on this question of affiliated and non-affiliated split or run.

Mr. Caskey: This represents, sir, what the company believes is the source of its revenue. The instructions, as Mr. Eadie has said, were, each exchange (2167)

Wilfred J. Eadie—By Defendant—Direct

manager was asked to classify the theatres in his exchange area as to the source of revenue, and if the exchange manager said that the Poli Theatre in New Haven is operated by Loew and Loew pays the film bill, it was treated as a Loew theatre. I submit there could not be any better basis of doing it. And it is inconceivable that the errors in classification should be of any consequence. It might fluctuate a tenth of one per cent or something. Substantially speaking, it is the only feasible way of making up the chart.

Direct Examination Resumed by Mr. Caskey:

Q. These classifications, Mr. Eadie, were all reviewed by the home office, where they not, as to the theatres in towns of 25,000 or more? A. Yes.

Q. And an I. B. M. card punched for every single theatre in these cities of 25,000, and more? A. Yes, sir.

Q. You have had occasion within the last week to review those classifications? A. Yes, sir.

Q. And do you believe them to be correct? A. I do.

Judge Goddard: If the companies that operated the theatres were subsidiaries of Paramount, did you include them?

The Witness: Yes, sir.

(2168)

Judge Bright: In the Paramount column?

The Witness: Yes, sir.

Judge Hand: We will allow it.

(Marked Defendant Fox's Exhibit F-19.)

Q. The 1943-44 season, Mr. Eadie, have you prepared a schedule showing the ten pictures which grossed the most, the United States revenue and the average per booking? A. Yes, sir.

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Mr. Caskey: I offer that.

(Marked Defendant Fox's Exhibit F-20 for identification.)

Q. Have you the Sweet Rosie O'Grady chart? A. No, I haven't.

Mr. Wright: We have no objection to F-20.

(Defendant Fox's Exhibit F-20 for identification received in evidence.)

* (Defendant Fox's Exhibit F-21 marked for identification.)

Q. Mr. Eadie, have you prepared or caused to be prepared a chart analyzing the source of the film rental on Sweet Rosie O'Grady in the first-run and extended or move-over engagements in the 92 cities with a population of 100,000 or more? A. Yes, sir.

Q. This is similar in form to the chart which was prepared in reference to a Tree Grows in Brooklyn? A. Yes, sir.
(2169)

Q. What was your domestic film rental on Sweet Rosie O'Grady, total? A. To October 13, 1945, at which time it had completed most of its runs, \$2,821,772.

Q. Of that sum what percentage was received from the first-run in these 92 cities? A. \$775,334.

Q. That is what percentage of the total? A. 27.48 per cent.

Q. Of that how much was received from theatres in which Twentieth Century-Fox has an interest? A. 10.56 or \$298,008.

Q. With regard to the Paramount affiliates, each of them is set forth separately on pages 1 and 2 of the schedule, are they not? A. Yes, sir.

Wilfred J. Eadie—By Defendant—Cross

Q. Treating them in the aggregate, what percentage came from those affiliates? A. 21.99.

Q. No, no—that is of the first-run revenue, is it not? A. Yes, sir.

Q. And of the total United States gross, 6 per cent, is it not? A. Total United States gross is 6.04 per cent, correct.

Q. And you have separately shown the Standard Theatres in Oklahoma City and the Butterfield Theatres? A. Yes, sir.

Mr. Caskey: I offer it.

Mr. Wright: No objection.

Mr. Caskey: They should check, Mr. Wright, with the answers to the interrogatories.

(2170)

Mr. Wright: Of course, you get a difference—

Mr. Caskey: That is right. Well now, Mr. Wright raises the point that the figure here is to October 13th, but I have already put in evidence the figure of March 31st, which is in the interrogatories; which is about \$2,806,272. So that you will see there has only been \$15,000 come in in the interval.

(Defendant Fox's Exhibit F-21 for identification received in evidence.)

(2171)

Judge Bright: F-21 does not include, in the recapitulation, any figures of Fox receipts?

Mr. Caskey: Yes, sir; National Theatres, including the Roxy, is the third classification.

You may examine.

Mr. Seymour: I would like to ask one question before Mr. Wright.

Cross Examination by Mr. Seymour:

Q. You were asked, I think, from what geographical source Fox received the film rental which came to it from

Wilfred J. Eadie—By Defendant—Cross

the various theatre operating companies in which Paramount is interested. Isn't the fact that those checks come in from the exchanges in the various areas where those theatre operating companies are located? A. Where the pictures are sold through an exchange area, yes, sir.

Q. They do not come in from Paramount, they come in from the theatre operating companies, isn't that so? A. Where the theatres are sold in the operating districts, yes, sir.

Mr. Caskey: I neglected to ask one question.

By Mr. Caskey:

Q. The Roxy theatre is operated by a subsidiary of Twentieth Century-Fox, is it not? A. Yes, sir.

Q. It does extensive advertising on the first-run of Twentieth Century-Fox pictures? A. Yes, sir.
(2172)

Q. I show you this memorandum and ask you if it is not the fact that on many pictures the amount spent on advertising by Twentieth Century-Fox is greater than the film rental? A. Yes, sir.

Q. What is the purpose of that expenditure? A. Well, we have to properly merchandise our product in the area and we spend a lot of money to get them off to a good start in our first-run theatres. It is the first-runs that sell the subsequent runs.

Mr. Caskey: You may inquire.

Cross Examination by Mr. Wright:

Q. I call your attention to this exhibit, F-21. That, I believe, shows, does it not, that more than 80 per cent of the first-run rental that came out of the 92 cities of more than 100,000 population was from affiliated theatres, isn't that right? A. 80 per cent, sir?

Wilfred J. Eadie—By Defendant—Cross

Q. Yes, more than 80 per cent, I said. More than 80 per cent of the total first-run revenue. A. I haven't made the addition.

Q. You can tell that—— A. (Continuing). Or calculation.

Q. —by looking at it, can't you? A. The figures are there. If it is 80 per cent, it is unavoidable.

Q. Now, in this, do you attempt any computation as to the total percentage of first-run revenue that came out of (2173)

affiliated theatres, limiting the computation to the towns where there were affiliated theatres? A. I did not get your question, Mr. Wright.

Q. In many of these 92 cities, or in some of these 92 cities of more than 100,000 population, there are no affiliated theatres at all, are there? A. I don't know.

Q. What I wanted to know, if you have computed a figure which would show the extent of the total first-run revenue in cities of this size which came from affiliated theatres in towns where affiliated theatres were operated?

Mr. Caskey: Just a moment. As I understand it, there are only four such towns in the United States, and my addition shows that they accounted for \$13,000 of this \$775,000 revenue.

Mr. Wright: Can we have some testimony from the witness?

A. I did not compute those figures by themselves.

Q. But, of course—— A. I can't say from my own knowledge.

Q. —you know what the percentage of affiliated first run revenue would be, excluding those wholly independent towns? A. No, sir.

Q. You made no effort to compute the total affiliated rental that came out of any of these towns, is that right?

Wilfred J. Eadie—By Defendant—Cross

A. One schedule there, Schedule 3—I don't know what exhibit number it was—(2174)

that shows first-run revenue there from affiliates and independents.

Q. Yes, I say— A. Total \$92,000.

Q. —there is nothing on this exhibit or in any other computation you have offered that enables anyone to determine the total percentage of revenue that came out of any one of these towns that came from affiliated theatres, is that right? A. We took the 92 cities altogether. We did not pick out any individual cities. We have a computation of each of the individual cities, of course.

Q. You have no computation as to any individual city which shows the extent of the total revenue coming out of that situation, that came from affiliated theatres, have you? A. We have a complete analysis of all the figures that we have in here by towns, by theatres.

Q. Can't you answer the question? A. You are asking if I have—if I can recollect, as I understand it, any individual city results. I cannot.

Q. I am just asking you if you have made any computation as to the percentage of the total—of the total revenue that comes out of any of these cities that comes from affiliated theatres on all runs? A. I don't quite get what you are driving at, but this column shows all the rentals that came from all runs from all affiliated theatres in the 92 cities.

(2175)

Q. Which column? A. For 12 cities.

Mr. Wright: I think we have different exhibits in our hands.

Judge Bright: What is this column you refer to?

The Witness: I don't know what the number is, sir, but schedule 3. It is in evidence as an exhibit. This is the total—

Wilfred J. Eadie—By Defendant—Cross

Judge Bright: That is F-19.

Mr. Caskey: F-19 shows the very thing he is talking about.

Judge Bright: That is F-19 he is talking about.

Q. Certainly there is nothing in F-21 then to indicate the percentage of revenue that came out of any town that came from affiliated theatres on all runs, isn't that right?

A. Is this the Sweet Rosie O'Grady analysis?

Q. I am talking about F-21, yes, Sweet Rosie O'Grady.

A. I think the exhibit speaks for itself. I do not know just what you are driving at. The analysis is complete in the exhibit.

Q. Yes, I understand that, but apart from this exhibit, have you made any analysis to determine the percentage of the total revenue that you got out of any of these towns with more than 100,000 population which came from affiliated theatres, that is, all exhibitions in the town of the picture on all runs? A. The entire 34 pictures are shown on F-19.

(2176).

Mr. Caskey: It is right here.

Q. That shows all the releases, not just one picture. F-19, as I understand it, does not undertake to show the percentage of revenue in any particular town that came from affiliated theatres on any picture or on a season's pictures, isn't that right? A. It shows the entire 92 towns.

Q. Yes. A. If you are interested in Philadelphia, Atlantic City, or some other town, we would have to compute it for you.

Q. That is what I am trying to get at, as to whether you have in fact made any computation which would show what the percentage of the total revenue in any particular town was that you got out of affiliated theatres in the town on all runs? A. We can get any—we have the cards punched for all

Wilfred J. Eadie—By Defendant—Cross

these things. We can get any information we require out of it in detail.

Q. Can you give us the percentage—let us take these 92 cities of more than 100,000 population. With respect to each of those cities, you can, then, give us, can you not, on this picture, Sweet Rosie O'Grady, the percentage of the total revenue in each of the towns in question that was derived from affiliated theatres on all runs, isn't that right? A. Yes, sir.

(2177)

Q. Could you supply—

Mr. Caskey: Just a moment. I do not think that is a proper question. If we want to put it in evidence, we will. If you want something, I should think you should request counsel to give it or subpoena it.

Mr. Wright: I think, in order that the Court may have a full picture, this Exhibit F-21 should be supplemented with a town-by-town breakdown which will show the situation as to affiliated and independent revenue in each place. This thing is highly misleading and shows only part of the picture because of its inclusion of areas where affiliated theatres do not even operate. Our contention, of course, is that this is a highly selective control, where both control of admission prices and film rentals is maintained by maintaining control in key areas, which in turn control other areas. Certainly, for our purposes and for the Court's purpose, I think the only analysis that is going to be helpful is one which will show the extent and nature and quality of the control in the specific areas in which these defendants operate theatres.

Judge Hand: Go on with your cross-examination.

Mr. Wright: As to these two charts, I have no further cross-examination, if counsel is willing to supply those figures.

Colloquy

Mr. Caskey: I suggest he cross examine the witness (2178)

ness and we will produce what we think is appropriate to our case. If you want something else, why, we will discuss it or you may subpoena it. It hasn't anything to do with conditioning of cross-examination.

Judge Bright: Before we leave that, Mr. Wright, on this F-21, the last column shows percentage of U. S. gross at October 13th. What is the basis of those percentages?

The Witness: That is a tabulation, sir, of billings, individual invoices. That means October 13, 1945, which was the latest available figures that have been tabulated on this picture.

Judge Bright: I still do not quite understand. Do you mean, taking the first line, Paramount affiliates, that they had 6.04 of the billings?

The Witness: Yes, sir. That means that the \$170,527.06 in the first column represents 6.04 per cent of the total United States billings on Sweet Rosie O'Grady, which is the figure on the last line of the sheet of \$2,821,772. So we received—

Judge Bright: So that particular column does not refer to dollars?

The Witness: No, that is a percentage of these dollars over here in relation to the total revenue from the United States, 6.04 per cent of \$2,821,000 which

(2179)

came from Paramount affiliates in first-run situations. The total of that righthand column, sir, is 27.48 per cent, and that is total first-run revenue received in the United States from the exhibition of Sweet Rosie O'Grady.

Judge Bright: You mean the total of all your revenue.

Wilfred J. Eadie—By Defendant—Cross

The Witness: All first-run revenue, 27.48 per cent of the total revenue, \$2,821,000, and of that \$2,821,000 we got from first-run Paramount \$170,000, or about six per cent. Is that clear, sir?

(2180)

Q. I think you answered one of Judge Bright's questions wrong. This percentage of gross does not refer to percentage of billings; it refers actually to percentage of dollar volume, isn't that right? A. Yes, sir, except our billings are dollar volume.

Q. Yes, but there is nothing on the chart to show the number of billings that the gross was represented by, in any event, is there? A. Not the number, no, sir.

Q. Now, this F-20—have you got that in front of you? That is the chart headed "Twentieth Century-Fox Film Corporation 10 Highest Gross 1943-44 Features as of March 31, 1945." A. Yes, sir.

Q. I notice the first picture you have there, Song of Bernadette—that picture was not generally released in that season at all, was it? A. No, sir; it was what is called road-showed at advanced admission prices.

Q. These bookings that are listed there were all for road showings, is that right? A. Yes, or advanced prices, is the accurate term.

Q. Now, when you were referring in your testimony to what you call distribution costs, I take it those costs are not reflected in any of this tabular material that was offered, are they? A. I believe there is one schedule that shows it, sir (examining)—no, there is not. It is not shown anywhere.

(2181)

Q. I notice this F-17 which gives negative costs in domestic film rentals gives no data as to distribution costs at all.

Wilfred J. Eadie—By Defendant—Cross

Now, of course, you operate a world-wide distribution system, do you not? A. Yes, sir.

Q. That is, you distribute films or license them all over the world? A. Yes, sir.

Q. And this distribution cost that you are talking about,—that is simply an estimated allocation that you attribute to domestic distribution? A. It is a very conservative figure. It is quite a little bit below the actual by years.

Q. Well, just tell me how you arrive at this distribution cost figure that you were talking about. A. Distribution costs include such items as positive prints, advertising, cost of operating domestic exchanges; the sales departments; the accounting departments; the legal departments—all the costs of getting our revenue out of the pictures outside of the negative costs which terminate when the picture leaves the studio.

Q. You include in negative costs everything or all expenses that are incurred in connection with production of any kind? A. Yes, sir.

Q. How about your overhead costs? Where do those go, in your distribution or in your negative costs? A. Studio overhead goes in production costs and distribution overhead (2182) goes to distribution costs.

Q. Then how about your home office or your overall overhead? Do you allocate that? A. We consider that part of distribution.

Q. Well, that entire cost there goes into your distribution cost? A. Yes, sir.

Q. And then you make some kind of allocation, do you, to determine your domestic distribution cost as against your distribution costs in any other area? A. Yes, sir.

Q. Do you allocate your general overhead home office expenses there? A. Yes, we keep the foreign costs separate from the domestic.

Wilfred J. Eadie—By Defendant—Cross

Q. I say, what do you do with your home office overhead there? A. The domestic home office overhead is part of domestic distribution costs.

Q. Well, you have here in this country a home office which supervises the worldwide distribution, isn't that right?

A. We have a separate foreign distribution company, and those costs are segregated and kept in the foreign costs.

Q. Well, that is wholly owned, is it not, by you? A. Yes, sir.

Q. So that you take your top company, home office overhead cost and you allocate all of that to domestic distribution, is that right? A. That part that belongs to domestic, (2183)

yes, sir.

Q. Well, how do you determine which part belongs to the domestic and which part is foreign? A. Well, we have a foreign international corporation which is headed by a president and has a full board of directors and officers, and has its own expenses, including its own telephone bills, its rent, its light, depreciation of its equipment, all the expenses that apply to it.

Q. But all the costs other than those separately billed to that foreign corporation are allocated to domestic distribution, is that right? A. Yes, sir.

Q. Now, do you keep separate profit and loss figures for domestic performance of a picture as against over-all performance? A. Yes, sir.

Q. You do have those figures on every picture which would show a profit or loss on the picture? A. Yes, sir.

Q. And you do not publish in your annual statements, I believe, any profit or loss figures which attempt to break down distribution from production profits, is that right? A. No, sir, we don't analyze them that way.

Q. You simply figure on overall profit on your production and distribution activities? A. Consolidated, yes, sir.

Wilfred J. Eadie—By Defendant—Cross

Q. And how about your theatre operations? A. They are all consolidated in our published statements, sir.

(2184)

Judge Bright: Do you keep them separately?

The Witness: Oh, yes, we keep them separately; but Mr. Wright is talking about our published statements, and they are on a consolidated basis.

Q. In your published statements you consolidate all three, but for your own bookkeeping purposes you have a profit and loss statement on the production activity separate from the distribution of the film? A. Not a profit and loss statement. We keep the cost separately.

Q. The only separation is in cost, and when it comes to profit and loss, you simply have one figure for the picture which covers both your production and your distribution activities in connection with that picture, is that right? A. On each individual picture?

Q. Yes. A. We make a calculation of our profit and loss on each individual picture, using an allocation, yes, sir.

Judge Bright: What do you mean by using an allocation.

The Witness: Showing our domestic costs and distribution, and our foreign costs and distribution, so we know what our foreign profits are and our domestic profits.

Judge Bright: Do you allocate your profits to the three branches of production, distribution and exhibition?

(2185)

The Witness: No, sir; we just allocate it to domestic and foreign distribution.

Q. And you make no profit allocation as between production and distribution on any picture, is that right? A. No, sir.

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(Pages 1596 to 2155)

Supreme Court of the United States
OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

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PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL

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No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 8, 1947.

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No. 85

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

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Wilfred J. Eadie—By Defendant—Redirect

Q. But you have profit figures for each picture? A. We have a picture profit and loss report on each picture, yes, sir.

Q. I suppose you do not have any personal knowledge as to the extent to which these increased costs you have reflected here have been realized in the form of increased admission prices? A. No, sir.

Mr. Wright: That is all.

Redirect Examination by Mr. Caskey:

Q. Mr. Eadie, where are the books of National Theatres Corporation kept? A. The main books are kept in the home office in Los Angeles.

Q. And where are the subsidiary books kept? A. They have several division offices.

Q. Do you keep those books? A. No, sir.

Q. Do you supervise the keeping of those books? A. No, sir.

Q. Now, those books are audited by a firm of certified public accountants? A. Yes, sir.

(2186)

Q. What firm is that? A. Lybrand, Ross Bros. & Montgomery.

Q. And who audits the books of Twentieth Century-Fox? A. Touche, Niven & Company.

Q. Since you have acquired 100 per cent of National's theatres in 1943, has it been required that the company publish a consolidated statement? A. You mean National Theatres, sir?

Q. No. Did Twentieth Century-Fox publish a consolidated statement? A. Yes, sir.

Q. Who does the consolidating? A. It is under my supervision.

Q. From the reports of the two firms of independent accountants? A. Yes, sir.

Witfred J. Eadie—By Defendant—Recross

Q. Now, there is just one other point I want to make perfectly sure about: Will you take Exhibits F-19 and F-21. On Exhibits F-21, the total revenue first-run in the 92 cities on Sweet Rosie O'Grady was what percentage of the total national revenue? A. 27.48 per cent.

Q. Now, what percentage of all 34 pictures was it as shown on Exhibit F-19— A. 25.7 per cent.

Q. And the figure on F-19 of 25.7 per cent is the comparable figure to 27.48 per cent on the one picture Sweet Rosie O'Grady? A. Yes, sir. △

Q. That was the highest grossing picture of the year of (2187) that season's release, or one of the highest? A. One of the highest.

Mr. Caskey: That is all.

Recross Examination by Mr. Wright:

Q. I notice when you include your entire 34 feature pictures there, you then get a lesser figure for total percentage of affiliation than you get from simply your higher grossing pictures? A. Will you just repeat that, Mr. Wright?

Q. Well, it is a fact, is it not, that on your higher grossing pictures you have a higher percentage of rental from affiliated theatres than you do on your low grossing pictures, is that right? A. I don't have those figures. I do not think it necessarily follows.

Mr. Wright: That is all.

Mr. Caskey: That is all.

Mr. Leisure: With the Court's permission I am going to call the president of RKO at this time.

Mr. Rathvon, will you please take the stand?

Judge Hand: Are you all right to go on, Mr. Leisure?

Mr. Leisure: Yes, sir. Thank you very much.